

No. 83-2030-AFX
Status: GRANTED

Title: Board of Education of the City of Oklahoma City,
Oklahoma, Appellant
v.
National Gay Task Force

Docketed:
June 9, 1984

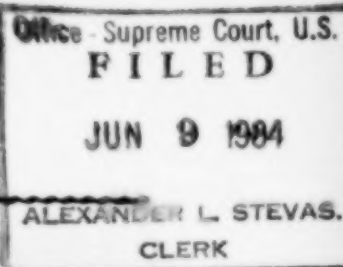
Court: United States Court of Appeals
for the Tenth Circuit

Counsel for appellant: Lewis, Larry, Arrow, Dennis W.

Counsel for appellee: Graff, Leonard, Tribe, Laurence H.,
Simon, Anne E.

Entry	Date	Note	Proceedings and Orders
1	Jun 9 1984	G	Statement as to jurisdiction filed.
3	Jul 6 1984		Order extending time to file response to jurisdictional statement until July 18, 1984.
4	Jul 18 1984		DISTRIBUTED. September 24, 1984
5	Jul 18 1984	X	Motion of appellee to affirm filed.
6	Oct 1 1984		PROBABLE JURISDICTION NOTED. *****
7	Nov 15 1984		Joint appendix filed.
8	Nov 15 1984		Brief of appellant Bd. of Ed., OK City, OK filed.
9	Nov 15 1984		Brief amicus curiae of Washington Legal Foundation filed.
10	Nov 15 1984		Brief amicus curiae of Concerned Women for America Education & Legal Defense Fd filed.
11	Nov 15 1984		Brief amicus curiae of National School Board Assn. filed.
12	Nov 15 1984		Brief amicus curiae of Oklahoma filed.
13	Dec 4 1984		SET FOR ARGUMENT. Monday, January 14, 1985. (4th case)
14	Dec 6 1984		Record filed.
15	Dec 6 1984		Certified C. A. proceedings received.
16	Dec 10 1984		CIRCULATED.
17	Dec 12 1984		Record filed.
18	Dec 12 1984		Certified copy of original record on appeal received.
20	Dec 14 1984		Order extending time to file brief of appellee on the merits until December 26, 1984.
23	Dec 17 1984	X	Brief amicus curiae of National Education Assn., et al. filed.
24	Dec 18 1984	X	Brief amicus curiae of Attorneys General of New York and California filed.
25	Dec 17 1984	X	Brief amicus curiae of American Assn. for Personal Privacy et al. filed.
26	Dec 19 1984	X	Brief amicus curiae of Lambda Legal Defense Fund, Inc filed
27	Dec 24 1984	X	Brief of appellee National Gay Task Force filed.
28	Dec 24 1984	X	Brief amicus curiae of Center for Constitutional Rights, et al. filed.
29	Dec 24 1984	X	Brief amicus curiae of American Assn. of University Professors filed.
30	Dec 26 1984		LODGING. Policy Documents and Reports of American Association of University Professors.
31	Dec 26 1984		LODGING received.
32	Jan 5 1985	X	Reply brief of appellant Bd. of Ed., OK City, OK filed.
33	Jan 14 1985		ARGUED.

83 - 2030



No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

THE BOARD OF EDUCATION OF THE CITY OF
OKLAHOMA CITY, STATE OF OKLAHOMA,
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

On Appeal from the United States Court of Appeals,
Tenth Circuit

JURISDICTIONAL STATEMENT

Larry Lewis
Counsel of Record
Suite 410
4001 N. Lincoln
Oklahoma City, Oklahoma 73105

James B. Croy
P. O. Box 10798
Midwest City, Oklahoma 73140

Attorneys for Appellant

June, 1984

QUESTIONS PRESENTED

Whether the state statute on its face unconstitutionally infringes upon protected free speech rights of public school teachers.

Whether the state statute is so facially overbroad as to infringe upon the protected free speech rights of public school teachers.

Whether if the state statute is facially overbroad the statute can be so narrowly construed as to uphold the statute's constitutionality.

TABLE OF CONTENTS

	PAGE
Questions Presented	ii
Introduction	1
Opinions Below	2
Jurisdiction	2
State Statute Found Facially Unconstitutional	3
Constitutional Provisions Involved	4
Raising the Federal Questions	5
Statement of the Case	6
The Questions Are Substantial	8
Conclusion	15
Appendix A:	
Opinions of the U.S. Court of Appeals for the Tenth Circuit	
Appendix B:	
Memorandum Opinion and Order of the U.S. District Court for the Western District of Oklahoma	
Appendix C:	
Notice of Intention to Appeal	

TABLE OF AUTHORITIES

Cases	PAGE(S)
<i>Brandenburg v. Ohio</i> , 395 U.S. 44 (1969)	11
<i>Canfield v. State</i> , 506 P.2d 987 (Okla. Cr. 1972)	7
<i>Carson v. State</i> , 529 P.2d 499 (Okla. Cr. 1973)	7
<i>Moore v. State</i> , 501 P.2d 529 (Okla. Cr. 1972)	7
<i>Pickering v. Board of Education</i> , 391 U.S. 563 (1968)	9-10, 13, 14
<i>Tinker v. Des Moines Independent Community School District</i> , 393 U.S. 563 (1969)	11, 12, 13
Statutes Cited	
21 Okla. Stat. § 886	4
70 Okla. Stat. § 6-103.15	1, 3-4

No. _____

In the
Supreme Court of the United States
OCTOBER TERM, 1983

THE BOARD OF EDUCATION OF THE CITY OF
OKLAHOMA CITY, STATE OF OKLAHOMA,
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

On Appeal from the United States Court of Appeals,
Tenth Circuit

JURISDICTIONAL STATEMENT

INTRODUCTION

The Board of Education of the City of Oklahoma City, State of Oklahoma, appeals section II of the majority opinion of the United States Court of Appeals, Tenth Circuit, No. 82-1912, which was issued March 14, 1984. Section II of the opinion held a portion of the Oklahoma teacher employment termination statute, 70 Okla. Stat. Sec. 6-103.15, was *facially* unconstitutional in being so overbroad as to infringe upon protected free speech rights. The statute held to be unconstitutional permitted school boards to refuse to hire or to terminate the employment of teachers who have so engaged in "public homosexual conduct" as to be unfit as public school teachers.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Oklahoma, Judge Luther Eubanks, which appears as Appendix B hereto, was issued July 29, 1982. That opinion was not reported. The opinion held that the statute did not facially violate appellee member's rights of free speech or free association; was not vague or overbroad; did not interfere with privacy rights; did not violate equal protection of the law; and did not violate the Establishment Clause:

The opinion of the United States Court of Appeals for the Tenth Circuit, which appears as Appendix A hereto, was issued March 14, 1984, and is reported at 729 F.2d 1270. The Tenth Circuit affirmed the District Court opinion with the exception that section II of the opinion found that the statute facially infringed upon protected free speech and was thus overbroad. A dissenting opinion argued that the statute did not facially proscribe protected speech and was thus not overbroad.

JURISDICTION

District Court jurisdiction was based upon 28 U.S.C. Sec. 2201 and 28 U.S.C. Sec. 1331, the complaint praying for a Declaratory Judgment declaring the statute was facially unconstitutional.

The final opinion of the Tenth Circuit was issued March 14, 1984, and a Notice of Appeal to the Supreme Court was filed with the Tenth Circuit on May 11, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(2) since the Tenth Circuit held an Oklahoma statute on its face violated provisions of the United States Constitution.

THE STATE STATUTE FOUND TO BE FACIALLY UNCONSTITUTIONAL

The challenged statute, 70 Okla. Stat. Sec. 6-103.15, provides:

- A. As used in this section:
 - 1. "Public homosexual activity" means the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, if such act is:
 - a. committed with a person of the same sex, and
 - b. indiscreet and not practiced in private;
 - 2. "Public homosexual conduct" means advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees; and
 - 3. "Teacher" means a person as defined in Section 1-116 of Title 70 of the Oklahoma Statutes.
- B. In addition to any ground set forth in Section 6-103 of Title 70 of the Oklahoma Statutes, a teacher, student teacher or a teachers' aide may be refused employment, or reemployment, dismissed, or suspended after a finding that the teacher or teachers' aide has:
 - 1. Engaged in public homosexual conduct or activity;
 - 2. Has been rendered unfit, because of such conduct or activity, to hold a position as a teacher, student teacher or teachers' aide.
- C. The following factors will be considered in making the determination whether the teacher, student teacher or teachers' aide has been rendered unfit for his position:

1. The likelihood that the activity or conduct may adversely affect students or school employees;
2. The proximity in time or place the activity or conduct to the teacher's, student teacher's or teachers' aide's official duties.
3. Any extenuating or aggravating circumstances; and,
4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity.

The statute defines "public homosexual activity" as being the commission of the act defined in Section 886 of Title 21 of the Oklahoma Statutes when that act is committed with a person of the same sex and indiscreetly and not in private. 21 Okla. Stat. Sec. 886 is Oklahoma's criminal sodomy statute. That statute provides:

Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment in the penitentiary not exceeding ten (10) years.

CONSTITUTIONAL PROVISION INVOLVED

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech . . .

RAISING THE FEDERAL QUESTIONS

This case solely concerns federal constitutional issues.

The Appellee's complaint alleged 70 Okla. Stat. Sec. 6-103.15 was unconstitutional on its face and requested the District Court to enter a Declaratory Judgment holding the statute violated Appellee members' rights of free speech and free association, was vague and overbroad, interfered with members' privacy rights, violated equal protection of the law, and violated the Establishment Clause. The District Court rejected all of the federal constitutional claims of the Appellee.

The Tenth Circuit affirmed the holding of the District Court that the statute did not violate privacy rights, that the term "public homosexual activity" was not vague, that the statute did not violate equal protection of law, and that the statute did not offend the Establishment Clause. In Section II of the majority opinion the circuit court reversed the portion of the District Court's opinion that the "public homosexual conduct" section of the statute was not overbroad and did not violate the free speech rights of Appellee's members.

Thus, federal constitutional issues are the total concern of this litigation.

STATEMENT OF THE CASE

This case concerns a *facial* challenge to the constitutionality of a portion of the Oklahoma teacher termination statutes. The last section of those statutes, 70 Okla. Stat. Sec. 6-103.15, empowers Oklahoma school boards to suspend, dismiss, nonrenew or refuse to employ public school teachers who solicit, impose, encourage, advocate or promote indiscreet, "homosexual activity" (sodomy) when such solicitation, imposition, encouragement, advocacy or promotion so adversely affects the teaching abilities of the solicitor, imposer, encourager, promoter or advocate as to render that teacher unfit as a public school instructor. The statute lists the considerations which are to be used by the school board in determining whether there is a "nexus" between the sodomy solicitation, etc. and teacher ineffectiveness. Those considerations are the likelihood the teacher's solicitation, etc. may adversely affect school children or school employees; the proximity in time or place of the solicitation, etc. to the teacher's duties as a public school teacher; any extenuating or aggravating circumstances involved in the solicitation; and, whether the solicitation of criminal, homosexual sodomy is of such a repeated or continuing nature as to tend to encourage or dispose minor school children to commit criminal, homosexual sodomy.

Since this is a facial challenge there are no facts involved in this case. No facts have been presented that the Oklahoma City Board of Education has used the challenged statute to refuse to hire anyone or to terminate the employment of any employee. The Oklahoma City Board is a party merely because the Appellant happens to be a board

of education in Oklahoma and the Appellee needed a school board for a defendant to contest the constitutionality of the statute through a Declaratory Judgment suit.

The section of the statute which the majority circuit opinion held to be facially unconstitutional provides a school board may terminate the employment of, or refuse to hire, those who have engaged in "public homosexual conduct" to such a degree the applicant or teacher would be or is unfit as a teacher. "Public homosexual conduct" is defined in the statute as the advocating, soliciting, imposing, encouraging or promoting of public or private "homosexual activity" in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees. The statute defines "public homosexual activity" as "the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, if such act is: a. committed with a person of the same sex. and b. indiscreet and not practiced in private;"

The commission of an act "defined in Section 886 of Title 21" of the Oklahoma Statutes is the commission of criminal sodomy, *Carson v. State*, 529 P.2d 499 (Okla. Cr. 1974); *Canfield v. State*, 506 P.2d 987 (Okla. Cr. 1973), *appeal dismissed*, 414 U.S. 991 (1973), *rehearing denied*, 414 U.S. 1138 (1973); *Moore v. State*, 501 P.2d 529 (Okla. Cr. 1972), *cert. denied*, 410 U.S. 987 (1972).

Thus, the portion of the statute held by the majority of the circuit to be unconstitutional refers to the solicitation, etc. of criminal, homosexual sodomy when made in such a manner as to create a substantial risk the solicitation of criminal sodomy comes to the attention of school children

or school employees and renders a teacher unfit as a teacher after consideration of the nexus requirements listed in the statute.

THE QUESTIONS ARE SUBSTANTIAL

The questions presented in this appeal are so substantial that this Court should either reverse the majority opinion of the Tenth Circuit summarily, or, if not reversing the opinion, should require plenary consideration with briefs and oral argument.

That substantial federal constitutional questions are involved is shown by the reasoning used in the majority opinion in taking the extreme action of a federal court in holding a state statute regulating public school teachers to be unconstitutional on its face and also by the reasoning of the District Court and the dissenting circuit opinion in holding the statute is facially constitutional.

The statute which the majority circuit opinion held facially unconstitutional provides a public school teacher may be discharged after the teacher has solicited, imposed, encouraged, advocated or promoted the specific crime of sodomy with a person of the same sex when such sodomy is indiscreet and not practiced in private ("public homosexual activity") or has solicited, imposed, encouraged, advocated or promoted the specific crime of sodomy committed indiscreetly with a person of the same sex ("private homosexual activity") when the solicitation, imposition, encouragement, advocacy or promotion is made in such a manner that there is a substantial risk that such solicitation, etc., comes to the attention of minor school children or

school employees and also renders the teacher unfit as a teacher under the nexus considerations of the statute. Those nexus requirements are whether unfitness as public school teacher is shown by:

1. The likelihood the teacher's solicitation, imposition, encouragement, advocacy or promotion of criminal, homosexual sodomy may adversely affect school children or school employees;
2. The proximity in time or place of the solicitation, etc. of criminal, homosexual sodomy to the teacher's duties as a public school teacher in charge of minor school children;
3. Any extenuating or aggravating circumstances involved in the solicitation; and,
4. Whether the solicitation, etc. of criminal, homosexual sodomy is of such a repeated or continuing nature as to tend to encourage or dispose minor school children to commit criminal, homosexual sodomy.

The District Court found that the nexus considerations of the statute that bridge the solicitation of a crime with a finding of teacher unfitness meant that whatever speech rights existed in soliciting a crime were facially protected under the *Pickering v. Board of Education*, 391 U.S. 563 (1968) test:

The court held (App. B, pp. 7b-8b):

The statute at issue, within its definition of conduct or activity, includes certain activities which are associated with expression. However, engaging in the activities enumerated in the statute will result in discipline only where the teacher is also found to be unfit. The factors to be considered in the determination of

unfitness are akin to those factors cited in *Pickering*. The factors listed in the statute at issue are: the likelihood that the activity or conduct may adversely effect students or school employees; the proximity in time or place of the activity or conduct to the teacher's, student teacher's or teachers' aide's official duties; any extenuating or aggravating circumstances and; whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children towards similar conduct or activity. As stated above, the interest cited in *Pickering* were: removing incompetent employees and maintaining discipline; preserving harmony; and maintaining personal loyalty and confidence. Therefore, based upon *Pickering*, the statute at issue presents legitimate concerns which the state may counter-balance against its employee's right to freedom of expression.

It must be remembered that the statute was primarily written to regulate the conduct of teachers. Any restraint of free expression is merely an ancillary subject of the statute. That is why the statute speaks of unfitness rather than disruption.

The District Court further held the statute was not overbroad because only speech rendering the solicitor unfit as a teacher was proscribed. The court stated (App. B, p. 10b):

The statute specifically states what factors are to be considered in determining whether the activity causes the teacher to be unfit. Among the factors are: the activities' adverse affect on students and school employees; proximity in time or place of the conduct to the employee's official duties; and whether the activities are of a continuing nature which tends to encourage children toward similar activity.

The majority circuit opinion reversed because under *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the statute does not "necessarily imply incitement to imminent action" (App. A, p. 7a) and the nexus requirements of the statute do not necessarily amount to a material and substantial interference with school operations under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Judge Barrett, in his dissenting opinion to the Tenth Circuit's majority opinion, found that the statute did not affect protected speech (App. A, pp. 11a-12a):

Sodomy is *malum in se*, i.e., immoral and corruptible in its nature without regard to the fact of its being noticed or punished by the law of the state. It is not *malum prohibitum*, i.e., wrong only because it is forbidden by law and not involving moral turpitude. Any teacher who advocates, solicits, encourages, or promotes the practice of sodomy "in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees" is in fact and in truth inciting school children to participate in the abominable and detestable crime against nature. Such advocacy by school teachers, regardless of the situs when made, creates a substantial risk of being conveyed to school children. In my view, it does not merit any constitutional protection. There is no need to demonstrate that such conduct would bring about a material or substantial interference or disruption in the normal activities of the school. A teacher advocating the practice of sodomy is without First Amendment protection. The statute furthers an important and substantial government interest, as determined by the Oklahoma legislature, unrelated to the suppression of free speech. The incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

A substantial federal question is presented in the differences between the majority and dissenting circuit opinions regarding the applicability of *Brandenburg's* speech standard to an Oklahoma statute regulating public teacher fitness. The majority ruled the teacher fitness statute could not facially stand because the statute was not restricted to governing speech inciting imminent lawless action. The minority opinion held *Brandenburg*, a case involving advocacy of violent means of political reform when such advocacy was not likely to incite violence, was not the proper test in assessing the alleged overbreadth of a statute regulating solicitation of a specific *malum in se* crime by a public school teacher when such solicitation renders the teacher unfit to perform the governmental function of instructing minor school children. The dissent found there was nothing abstract about a teacher promoting the commission of criminal sodomy to such an extent the teacher was not fit to instruct minor children.

A substantial constitutional question arose when the majority applied the "material and substantial" interference speech standard of *Tinker*, a case involving political expression concerning a matter of vital national interest, as the proper test in determining the facial free speech merits of a statute regulating teacher fitness of those teachers who solicit or impose the crime of sodomy, the solicitation or encouragement of criminal, homosexual sodomy not being a matter of vital national political interest. The dissenting opinion (App. A, p. 12a) found *Tinker* "a poor vehicle for the majority to rely upon," since encouragement of the practice of criminal sodomy was not a matter at the heart of the First Amendment as was political expression, and to require

proof of a substantial and material interference with school operations when a public school teacher solicits or imposes or encourages or promotes or advocates criminal sodomy "is a bow to permissiveness."

Even if *Tinker's* standard does apply, the majority circuit opinion and the District Court differ as to the statute's facial compliance with *Tinker*. The District Court found the nexus requirements of the Oklahoma statute complied with the *Pickering* guidelines on balancing free speech interests with governmental restraints and that a teacher found unfit for homosexual, criminal sodomy imposition, encouragement, solicitation, encouragement or advocacy would comply with the substantial and material interference test of *Tinker* (App. B, p. 7b).

A substantial federal issue arose when the circuit majority determined there is no substantial and material interference with school operations when a teacher is rendered unfit as a teacher after soliciting criminal sodomy in such a manner that the solicitation of criminal sodomy comes to the attention of minor school children.

A substantial constitutional issue was raised when the majority held facially overbroad a statute which does not concern an abstract doctrine about political rights but rather the solicitation, encouragement, promotion, advocacy or imposition of a specific crime of sodomy by a public school teacher when the solicitation so adversely affected the teacher's instructional abilities as to render the solicitor unfit for the public school care of minor children.

A substantial constitutional issue was raised by the dissenting opinion as to whether the solicitation, of crimi-

nal, homosexual sodomy, the imposition of criminal, homosexual sodomy, or the encouragement, promotion or advocacy of the commission of criminal, homosexual sodomy is entitled to any constitutional speech protection.

A substantial constitutional question is present in whether the Oklahoma statute on its face denies public school teacher solicitors, imposers, encouragers, promoters or advocates of criminal, homosexual sodomy of any constitutional protection.

A substantial constitutional issue arose when the circuit majority used the extreme judicial power of holding a state public employee regulation to be unconstitutional on its face.

There is a substantial constitutional question in whether, even if the statute regulating teacher fitness does touch protected free speech rights, the statute cannot be so narrowly construed by the court so as to not infringe upon such rights.

The Constitution certainly affords free speech right to public school teachers. But these rights are not absolute and may be subjected to certain restrictions, as stated, for example, in *Pickering, supra*. The State of Oklahoma has enacted a statute, through its power to regulate teaching in the public schools, providing a school board may terminate teachers who solicit, impose, encourage, promote or advocate a specific crime when such action is made with a substantial risk of coming to the attention of school children or school employees and further renders the teacher unfit as a teacher under specific nexus requirements.

The majority circuit opinion has taken the extreme step of striking down this state governmental regulation on its face. That, in itself, raises a substantial federal question. Further, the differences in the majority and dissenting opinions over constitutional interpretations are significant, as are the differences between the majority opinion and the district court opinion.

CONCLUSION

For these reasons the Court is requested to either reverse the majority circuit opinion summarily, or, if not reversing the opinion, require plenary consideration with briefs on the merits and oral argument.

Respectfully submitted,

Larry Lewis
Counsel of Record
Suite 410
4001 N. Lincoln
Oklahoma City, Oklahoma 73105

James B. Croy
P. O. Box 10798
Midwest City, Oklahoma 73140

Attorneys for Appellant

June, 1984

APPENDICES

APPENDIX A

PUBLISH

[Filed March 14, 1984]

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

THE NATIONAL GAY TASK FORCE)	
and on behalf of all teachers and princi-)	
pals prospectively and presently employed)	
by the Board of Education of the City of)	
Oklahoma City, State of Oklahoma, and)	
who are similarly situated,)	
Plaintiff-Appellant,	)	No. 82-1912
v.)	
)	
THE BOARD OF EDUCATION OF THE)	
CITY OF OKLAHOMA CITY, STATE)	
OF OKLAHOMA,)	
Defendant-Appellee.)	

Appeal from the United States District Court
For the Western District of Oklahoma
(D. C. No. CIV-80-1174-E)

William B. Rogers of the American Civil Liberties Union of Oklahoma, Oklahoma City, Oklahoma (Leonard Graff and Don Knutson of Gay Rights Advocates, Inc., San Francisco, California, with him on the brief), for Plaintiff-Appellant.

Larry Lewis, Oklahoma City, Oklahoma, for Defendant-Appellee.

Sally E. Scott, Oklahoma City, Oklahoma, filed an amicus curiae brief for the Speech Communication Association.

Fred Okrand, Laurence R. Sperber, and Susan McGreivy, Los Angeles, California, filed an amicus curiae brief for the

[APPENDIX]

National Gay and Lesbian Rights Project of the American Civil Liberties Union.

E. Carrington Boggan and Rosalyn Richter, New York City, New York, filed an amicus curiae brief for the Lambda Legal Defense and Education Fund, Inc.

Before BARRETT, McKAY, and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

The National Gay Task Force (NGTF), whose membership includes teachers in the Oklahoma public school system, filed this action in the district court challenging the facial constitutional validity of Okla. Stat. tit. 70, § 6-103.15. The district court held that the statute was constitutionally valid. On appeal NGTF contends that the statute violates plaintiff's members' right to privacy and equal protection, that it is void for vagueness, that it violates the Establishment Clause, and finally, that it is overbroad.

The challenged statute, Okla. Stat. tit. 70, § 6-103.15, provides:

"A. As used in this section:

1. 'Public homosexual activity' means the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, if such act is:
 - a. committed with a person of the same sex, and
 - b. indiscreet and not practiced in private;
2. 'Public homosexual conduct' means advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees; and
3. 'Teacher' means a person as defined in Section 1-116 of Title 70 of the Oklahoma Statutes.

[APPENDIX]

B. In addition to any ground set forth in Section 6-103 of Title 70 of the Oklahoma Statutes, a teacher, student teacher or a teachers' aide may be refused employment, or reemployment, dismissed, or suspended after a finding that the teacher or teachers' aide has:

1. Engaged in public homosexual conduct or activity; and
2. Has been rendered unfit, because of such conduct or activity, to hold a position as a teacher, student teacher or teachers' aide.

C. The following factors shall be considered in making the determination whether the teacher, student teacher or teachers' aide has been rendered unfit for his position:

1. The likelihood that the activity or conduct may adversely affect students or school employees;
2. The proximity in time or place the activity or conduct to the teacher's student teacher's or teacher's aide's official duties;
3. Any extenuating or aggravating circumstances; and
4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity."

The trial court held that the statute reaches protected speech but upheld the constitutionality of the statute by reading a "material and substantial disruption" test into it. We disagree. The statute proscribes protected speech and is thus facially overbroad, and we cannot read into the statute a "material and substantial disruption" test. Therefore, we reverse the judgment of the trial court.

I

We see no constitutional problem in the statute's permitting a teacher to be fired for engaging in "public homosexual activity." Section 6-103.15 defines "public homosexual activity" as the commission of an act defined in Okla. Stat. tit. 21, § 886, that is committed with a person of the same sex and is indiscreet and not practiced in private. In support of their argument that this provision violates their members' right of privacy, plaintiff cites *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), and *New York v. Onofre*, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), cert. denied, 451 U.S. 987 (1981). Both of those cases held that the constitution protects consensual, noncommercial sexual acts in private between adults. *Baker* and *Onofre* are inapplicable to the instant case. Section 6-103.15 does not punish acts performed in private. Thus, the right of privacy, whatever its scope in regard to homosexual acts, is not implicated. See *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir.), cert. denied, 429 U.S. 977 (1976).

The trial court correctly rejected plaintiff's contention that the Oklahoma statute is vague in regard to "public homosexual activity." In *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), the Court outlined the doctrines of facial overbreadth and vagueness. Regarding vagueness the Court said:

"A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications."

455 U.S. at 497. Plaintiff makes no such showing. The Oklahoma cases construing the "crime against nature" statute have clearly defined the acts that the statute proscribes.¹

¹ Section 886 provides: "Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or

Plaintiff also argues that the statute violates its members' right to equal protection of the law. We cannot find that a classification based on the choice of sexual partners is suspect, especially since only four members of the Supreme Court have viewed gender as a suspect classification. *Frontiero v. Richardson*, 411 U.S. 677 (1973). See also *Baker v. Wade*, 553 F. Supp. 1121, 1144 n.58. Thus something less than a strict scrutiny test should be applied here. Surely a school may fire a teacher for engaging in an indiscreet public act of oral or anal intercourse. See *Amback v. Norwick*, 441 U.S. 68, 80 (1979). We also agree that the district court correctly rejected the Establishment Clause claim. See *Harris v. McCrae*, 448 U.S. 297 (1980).

II

The part of § 6-103.15 that allows punishment of teachers for "public homosexual conduct" does present constitutional problems. To be sure, this is a facial challenge, and facial challenges based on First Amendment overbreadth are "strong medicine" and should be used "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Nonetheless, invalidation is an appropriate remedy in the instant case because this portion of § 6-103.15

¹ (Continued)

with a beast, is punishable by imprisonment in the penitentiary not exceeding ten (10) years." The Oklahoma Court of Criminal Appeals has held that § 886 proscribes oral and anal copulation. *Berryman v. State*, 283 P.2d 558, 563 (Okla. Crim. App. 1955). In *Wainwright v. Stone*, 414 U.S. 21 (1973), the Court held that an almost identical Florida statute was not unconstitutionally vague because the Florida courts had specified that the statute applied to oral and anal copulation.

"When a state statute has been construed to forbid identifiable conduct so that 'interpretation by [the state court] puts these words in the statute as definitely as if it had been so amended by the legislature,' claims of impermissible vagueness must be judged in that light."

414 U.S. at 23, citing *Winters v. New York*, 333 U.S. 507, 514 (1948).

[APPENDIX]

is overbroad, is "not readily subject to a narrowing construction by the state courts," and "its deterrent effect on legitimate expression is both real and substantial." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). Also, we must be especially willing to invalidate a statute for facial overbreadth when, as here, the statute regulates "pure speech." *New York v. Ferber*, 50 U.S.L.W. 5077, 5083-84 (U.S. July 2, 1982); *Broadrick*, 413 U.S. at 615.

Section 6-103.15 allows punishment of teachers for "public homosexual conduct," which is defined as "advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees." Okla. Stat. tit. 70, § 6-103.15(A)(2). The First Amendment protects "advocacy" even of illegal conduct except when "advocacy" is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The First Amendment does not permit someone to be punished for advocating illegal conduct at some indefinite future time. *Hess v. Indiana*, 414 U.S. 105, 109 (1973).

"Encouraging" and "promoting," like "advocating," do not necessarily imply incitement to imminent action. A teacher who went before the Oklahoma legislature or appeared on television to urge the repeal of the Oklahoma anti-sodomy statute would be "advocating," "promoting," and "encouraging" homosexual sodomy and creating a substantial risk that his or her speech would come to the attention of school children or school employees if he or she said, "I think it is psychologically damaging for people with homosexual desires to suppress those desires. They should act on those desires and should be legally free to do so." Such statements, which are aimed at legal and social change, are at the core of First Amendment protections. As in *Erznoznik*, the statute by its plain terms is not easily susceptible of a narrowing construction. The Oklahoma

[APPENDIX]

legislature chose the word "advocacy" despite the Supreme Court's interpretation of that word in *Brandenburg*. Finally, the deterrent effect of § 6-103.15 is both real and substantial. It applies to all teachers, substitute teachers, and teachers aides in Oklahoma. To protect their jobs they must restrict their expression. See *Erznoznik*, 422 U.S. at 217. Thus, the § 6-103.15 proscription of advocating, encouraging, or promoting homosexual activity is unconstitutionally overbroad.

We recognize that a state has interests in regulating the speech of teachers that differ from its interests in regulating the speech of the general citizenry. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). But a state's interests outweigh a teacher's interests only when the expression results in a material or substantial interference or disruption in the normal activities of the school. See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). This Court has held that a teacher's First Amendment rights may be restricted only if "the employer shows that some restriction is necessary to prevent the disruption of official functions or to insure effective performance by the employee." *Childers v. Independent School District No. 1*, 676 F.2d 1338, 1341 (10th Cir. 1982). Defendant has made no such showing.

The statute declares that a teacher may be fired under § 6-103.15 only if there is a finding of "unfitness" and lists factors that are to be considered in determining "unfitness": whether the activity or conduct is likely to adversely affect students or school employees; whether the activity or conduct is close in time or place to the teacher's, student teacher's or teachers aide's official duties; whether any extenuating or aggravating circumstances exist; and whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity. An adverse effect on students or other employees is the only factor among those listed in § 6-103.15 that is even related to a material and substan-

[APPENDIX]

tial disruption. And although a material and substantial disruption is an adverse effect, many adverse effects are not material and substantial disruptions. The statute does not require that the teacher's public utterance occur in the classroom. Any public statement that would come to the attention of school children, their parents, or school employees that might lead someone to object to the teacher's social and political views would seem to justify a finding that the statement "may adversely affect" students or school employees. The statute does not specify the weight to be given to any of the factors listed. An adverse effect is apparently not even a prerequisite to a finding of unfitness. A statute is saved from a challenge to its overbreadth only if it is "readily subject" to a narrowing construction. It is not within this Court's power to construe and narrow state statutes. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). The unfitness requirement does not save § 6-103.15 from its unconstitutional overbreadth.

III

The parts of § 6-103.15 that deal with "public homosexual conduct" can be severed from the rest of the statute without creating a result that the legislature did not intend or contemplate. See *Tulsa Exposition and Fair Corp. v. Board of County Commissioners*, 468 P.2d 501, 507 (Okla. 1970); see also *Hejira Corp v. MacFarlane*, 660 F.2d 1356, 1362-63 (10th Cir 1981). We reverse the judgment of the district court, holding that the statute, insofar as it punishes "homosexual conduct," as that phrase is defined in the statute to include "advocating . . . encouraging or promoting public or private homosexual activity" is unconstitutional. We also hold that the unconstitutional portion is severable from the part of the statute that proscribes "homosexual activity," and we find that portion constitutional.

REVERSED.

[APPENDIX]

BARRETT, Circuit Judge, dissenting:

I would affirm the district court's finding that 70 O.S. § 6-103.15 passes constitutional muster on every "front" challenged. The majority opinion renders the statute ineffective. It upholds the sanctions of the statute *only* if there is evidence proving that a teacher has engaged in "public homosexual activity" defined in 70 O.S. § 6-03.15 (A.) (1.) (a.) and (b.).

The "punishment" referred to in the majority opinion which the majority holds may not be imposed on Oklahoma teachers is refusal of employment or reemployment, or dismissal or suspension if a teacher advocates, solicits, imposes, encourages or promotes "public homosexual activity" (which, by specific reference to the Oklahoma criminal code is distinctly identified as "the unnatural, perverse, detestable and abominable act of sodomy") in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees.

It is fundamental that state legislative bodies, in the exercise of state police power, may enact reasonable regulations in the interest of public health, safety, morals and welfare over persons within state limits. Oklahoma has, by enactment of the subject statute, endeavored to protect its school children and school employees from any teacher who advocates, solicits, encourages or promotes public or private *homosexual activity pinpointed as the commission of the unnatural and detestable act of sodomy*. 21 Okla. Stat. Ann. § 886 entitled "Crime against nature" provides: "Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment in the penitentiary not exceeding ten (10) years." Oklahoma has held that this section is not unconstitutionally vague even though it is general in its terms and circumstances, inasmuch as the terms convey adequate description of prohibited act or conduct to persons of ordinary understanding. *Carson v. State*,

[APPENDIX]

529 P.2d 499 (Okla. Cr. 1974); *Canfield v. State*, 506 P.2d 987 (Okla. Cr. 1973), *appeal dismissed*, 414 U.S. 991 (1973), *rehearing denied*, 414 U.S. 1138 (1973); *Moore v. State*, 501 P.2d 529 (Okla. Cr. 1972), *cert. denied*, 410 U.S. 987 (1972). Oklahoma has clearly announced that the offense of sodomy is not to be countenanced within its borders. Federal courts should not function as superlegislatures in order to judge the wisdom or desirability of legislative policy determinations in areas that neither affect fundamental rights nor proceed along suspect lines. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

In *Wainwright v. Stone*, 414 U.S. 21 (1973), the Supreme Court upheld a Florida statute which proscribed "the abominable and detestable crime against nature, either with mankind or with beast" against a constitutional challenge of void for vagueness. The Fifth Circuit had held the statute infirm as unconstitutionally vague and void on its face for failure to give adequate notice of the conduct forbidden by law. In reversing, the Supreme Court observed that copulation per os and per anum had long been held by Florida courts violative of the challenged statute as the "abominable and detestable" crimes against nature referred to in the statute. Hence, the Supreme Court found that the statute was subject to a narrowing construction.

The majority, unlike the district court, holds that portion of the statute which allows "punishment" for teachers for advocating "public homosexual conduct" to be overbroad because it is "not readily subject to a narrowing construction by the state courts" and "its deterrent effect on legitimate expression is both real and substantial." I disagree. Sodomy is *malum in se*, i.e., immoral and corruptible in its nature without regard to the fact of its being noticed or punished by the law of the state. It is not *malum prohibitum*, i.e., wrong *only* because it is forbidden by law and not involving moral turpitude. It is on this principle that I must part with the majority's holding that the "public homosexual conduct" portion of the Oklahoma statute is overbroad.

[APPENDIX]

Any teacher who advocates, solicits, encourages or promotes the practice of sodomy "in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees" is in fact and in truth *inciting* school children to participate in the abominable and detestable crime against nature. Such advocacy by school teachers, regardless of the situs where made, creates a substantial risk of being conveyed to school children. In my view, it does not merit any constitutional protection. There is no need to demonstrate that such conduct would bring about a material or substantial interference or disruption in the normal activities of the school. A teacher advocating the practice of sodomy to school children is without First Amendment protection. This statute furthers an important and substantial government interest, as determined by the Oklahoma legislature, unrelated to the suppression of free speech. The incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) is a poor vehicle for the majority to rely upon. There, the Supreme Court simply held that school children opposed to the Vietnam conflict were protected under the First Amendment in their practice of wearing black arm bands in protest thereto, unless that conduct could be shown to substantially interfere or disrupt normal school activities. *Tinker* involved a symbolic demonstration involving a matter of national political significance. Political expression and association is at the very heart of the First Amendment. The advocacy of a practice as universally condemned as the crime of sodomy hardly qualifies as such. There is no need to establish that such advocacy will interfere, substantially or otherwise, in normal school activities. It is sufficient that such advocacy is advanced in a manner that creates a substantial risk that such conduct will encourage school children to commit the abominable crime against nature. This finds solid support

[APPENDIX]

in *Tinker, supra*, where the Court said "First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment' in the particular case." 393 U.S. 503, 506.

The Oklahoma legislature has declared that the advocacy by teachers of homosexual acts to school children is a matter of statewide concern. The Oklahoma statute does not condemn or in anywise affect teachers, homosexual or otherwise, except to the extent of the non-advocacy restraint aimed at the protection of school children. It does not deny them any rights as human beings. To equate such "restraint" on First Amendment speech with the *Tinker* armband display and to require proof that advocacy of the act of sodomy will substantially interfere or disrupt normal school activities is a bow to permissiveness. To the same extent, the advocacy of violence, sabotage and terrorism as a means of effecting political reform held in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) to be protected speech unless demonstrated as directed to and likely to incite or produce such action *did not* involve advocacy of a crime *malum in se* to school children by a school teacher.

Facial overbreadth challenges are "manifestly strong medicine" which must be employed "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). When a party asserts such a challenge, the overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. A statute's "plainly legitimate sweep" usually includes "controls over harmful, constitutionally unprotected conduct." *Id.* A broadly-worded statute which does deter some protected speech or conduct may not require invalidation if that deterrence can, with confidence, justify such action. *Id.*

In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), the Supreme Court set down its initial guidelines for determining when deterrence of speech or conduct does or

[APPENDIX]

does not justify invalidation of a statute. The Court held that a statute is overbroad if it proscribes speech or conduct which "merely advocates the doctrine in the abstract without any attempt to indoctrinate others, or incite others to action in furtherance of unlawful aims." *Id.* at 599-600. The Court drew a distinction between speech or conduct advocating an abstract doctrine or belief, which demands constitutional protection, and advocacy of unlawful action or acts, with the intent to incite, which deserves no such protection. See also *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 444 (1974); *Brandenburg v. Ohio, supra*; *Yates v. United States*, 354 U.S. 298, 318-27 (1956). I submit that in the context of the Oklahoma public school system, the advocacy of sodomy by a teacher in a manner "that creates a substantial risk" it will come to the attention of school children deserves no First Amendment protection.

There is nothing abstract about a teacher advocating to school children the commission of the criminal act proscribed by section 886, *supra*. The expression proscribed by § 6-103.15 is the advocacy of the commission of the very act held to be a criminal act in *Canfield*. Thus, the deterred speech or conduct concerns "advocating," "promoting" and "encouraging" school children to commit the crime of sodomy. In the context of the public school system involving the teacher-student relationship, it cannot be said that the advocacy of such action is mere advocacy of an abstract doctrine or belief. See *Keyishian, supra* at 599-600. To hold otherwise ignores the difference between children and adults.

I would affirm.

APPENDIX B

[Filed June 29, 1982]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

THE NATIONAL GAY TASK FORCE)	
and on behalf of all teachers and princi-)	
pals prospectively and presently employed)	
by the Board of Education of the City of)	
Oklahoma City, State of Oklahoma, and)	
who are similarly situated,	)	No. CIV-80-
	)	1174-E
Plaintiffs,)	
vs.)	
)	
THE BOARD OF EDUCATION OF THE)	
CITY OF OKLAHOMA CITY, STATE)	
OF OKLAHOMA,)	
Defendant.)	

William B. Rogers of Ames, Daugherty, Black, Ashabran-
ner, Rogers & Fowler, 6440 Avondale Dr., Suite 200, Okla-
homa City, Oklahoma 73116, counsel for plaintiff.

Eric J. Groves of Jernigan, Groves, Bleakley & Tague, 1200
North Shartel, Oklahoma City, Oklahoma 73103, counsel for
defendant.

Fred Okrand and Susan McGreivy of ACLU Foundation of
Southern California, 633 South Shatto Place, Los Angeles,
California 90005, Amicus Curiae.

Sally E. Scott of the Commission on Freedom of Speech of
the Speech Communication Association, 1600 Midland Cen-
ter, Oklahoma City, Oklahoma 73102, Amicus Curiae.

MEMORANDUM OPINION AND ORDER

[APPENDIX]

Before LUTHER B. EUBANKS, United States District Judge.

Before the Court for resolution is plaintiff's Motion for Judgment. There is no dispute as to the facts since plaintiffs claim the target statute is facially unconstitutional. The issues before this court have been fully briefed and the case is now ripe for final decision. The challenged statute, 70 O.S. §6-103.15, inter alia, provides:

A. As used in this section:

1. "Public homosexual activity" means the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, if such act is:
 - a. committed with a person of the same sex, and
 - b. indiscreet and not practiced in private;
2. "Public homosexual conduct" means advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees; and
3. "Teacher" means a person as defined in Section 1-116 of Title 70 of the Oklahoma Statutes.

B. In addition to any ground set forth in Section 6-103 of Title 70 of the Oklahoma Statutes, a teacher, student teacher or a teachers' aide may be refused employment, or reemployment, dismissed, or suspended after a finding that the teacher or teachers' aide has:

1. Engaged in public homosexual conduct or activity; and
2. Has been rendered unfit, because of such conduct or activity, to hold a position as a teacher, student teacher or teachers' aide.

[APPENDIX]

- C. The following factors shall be considered in making the determination whether the teacher, student teacher or teachers' aide has been rendered unfit for his position:
 1. The likelihood that the activity or conduct may adversely affect students or school employees;
 2. The proximity in time or place the activity or conduct to the teacher's, student teacher's or teachers' aide's official duties.
 3. Any extenuating or aggravating circumstances; and
 4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity.

It should be noted that plaintiff challenges the facial validity of the statute. Therefore, no set of facts is presented to this court.

Plaintiff alleges that the statute is unconstitutional because: it interferes with plaintiff's members right of free speech; it is vague and overbroad; it interferes with plaintiff's members right of privacy; it violates the equal protection clause; and it violates plaintiff's right to freedom of religion.

I. FREEDOM OF EXPRESSION

Although once thought otherwise, the United States Supreme Court recognized in *Keyishian v. Board of Regents*, 385 U.S. 589, 89 S.Ct. 675, 17 L.Ed.2d 629 (1966) that public employment could not be conditioned upon the giving up of fundamental rights. However, within certain limits, the government has the right to control the conduct and speech of its employees. *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

[APPENDIX]

The case most clearly enunciating these principles is *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 20 L.Ed.2d 811 (1968). *Pickering*, a school teacher, was dismissed after writing a letter to the local newspaper. The letter was critical of the school board and school superintendent. There the court said:

[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees. 391 U.S. at 568.

Although the *Pickering* Court declined to enumerate specifically those factors that are to be weighed in arriving at the proper balance, the Court alluded to some general considerations which might show impairment of the governmental interest sufficient to activate the balancing test. Those factors include the government's interest in: removing incompetent employees; maintaining discipline by immediate superiors; preserving harmony among co-workers; and maintaining personal loyalty and confidence when necessary to a particular relationship.

In *Pickering*, the Court recognized that the plaintiff's statements were not directed toward any one person he was in daily contact with as a teacher and therefore no question of maintenance of discipline or harmony was present in the case. The court further said:

What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either

[APPENDIX]

impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public. 391 U.S. at 572-573.

The United States Supreme Court has subsequently, by application, held that the State's interests outweigh a teacher's interests only where the expression results in a material or substantial interference or disruption in the normal activities of the school. *Tinker v. Des Moines School Dist.*, 393 U.S. 503 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). See also *Rampey v. Allen*, 501 F.2d 1090 (10th Cir. 1974). And in *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 166 (4th Cir. 1976) the court recognized that the school "may regulate any conduct (homosexual or otherwise) which 'materially and substantially' disrupt[s] the work and discipline of the school."

Although the aforescribed cases apply equally to expression inside and outside the classroom, there may be additional considerations when the teacher's expressions occur within the academic environment. For example, it has long been recognized that states, acting through local school boards, are possessed of the power to inculcate basic community values in students who are not mature enough to deal with academic freedom as understood or practiced at higher educational levels. *East Hartford Education Assoc. v. Board of Ed.*, 562 F.2d 838, 843 (2nd Cir. 1977). It has also been said that "[w]e need no recital literary authorities . . . to buttress the principle that the teacher, like any other citizen, is free to think as he likes, and to express those views academically provided action is not advocated but merely adumbrated." *Aurora Ed. Assoc. v. Board of Ed.*, 490 F.2d 431, 434 (7th Cir. 1973).

[APPENDIX]

The statute at issue, within its definition of conduct or activity, includes certain activities which are associated with expression. However, engaging in the activities enumerated in the statute will result in discipline only where the teacher is also found to be unfit. The factors to be considered in the determination of unfitness are akin to those factors cited in *Pickering*. The factors listed in the statute at issue are: the likelihood that the activity or conduct may adversely affect students or school employees; the proximity in time or place of the activity or conduct to the teacher's, student teacher's or teacher's aide's official duties; any extenuating or aggravating circumstances and; whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children towards similar conduct or activity. As stated above, the interests cited in *Pickering* were: removing incompetent employees and maintaining discipline; preserving harmony; and maintaining personal loyalty and confidence. Therefore, based upon *Pickering*, the statute at issue presents legitimate concerns which the state may counter-balance against its employee's right to freedom of expression.

However, the factors considered in determining unfitness may not be read without reference to the overriding test of interference. Therefore, the crucial question is whether the expression contemplated by the statute substantially or materially interferes with the operation of the school. Only when substantial disruption is present is the employee's right of free expression outweighed, and therefore not constitutionally protected.

The Oklahoma Legislature chose to use the language "unfit to teach" rather than the language "materially or substantially disrupt." The question which this court must answer is whether an unfit teacher would materially disrupt normal school activities. It is apparent to this court that a teacher found unfit because of public homosexual activity or conduct would cause a substantial and material disruption of the school. It must be remembered that the statute

[APPENDIX]

was primarily written to regulate the conduct of teachers. Any restraint of free expression is merely an ancillary subject of the statute. That is why the statute speaks of unfitness rather than of disruption. And even if one could claim that an unfit teacher is not disruptive, the case law is clear that a teacher may not be disciplined under this or any other statute for mere expression unless it materially or substantially interferes with the performance of his duties. Accordingly, the statute does not affect any speech protected by the First Amendment.

However, before the court ends its discussion of the statute's affect upon free expression, another of plaintiff's arguments should be discussed. Plaintiff contends that the statute "chills" its members from freely associating. In a United States Supreme Court case involving the lobbying act, the Court made the following statement:

Hypothetical borderline situations are conjured up in which such persons choose to remain silent because of fear of possible prosecution for failure to comply with the Act. Our narrow construction of the act, precluding as it does reasonable fears, is calculated to avoid such restraint. But, even assuming such deterrent effect, the restraint is at most an indirect one resulting from self-censorship, comparable in many ways to restraint resulting from criminal libel laws. The hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional powers and is designed to safeguard a vital national interest. *United States v. Harris*, 347 U.S. 612, 626, 74 S.Ct. 822, 98 L.Ed. 1009 (1953).

Is the present statute any different than a libel law? This court thinks not. Clearly the only "chilling" is caused by unreasonable fear.

Plaintiff's remaining arguments concerning the statute's affect upon free expression are unpersuasive because the

[APPENDIX]

statute neither constitutes a prior restraint of protected expression nor allows discipline to a teacher for engaging therein.

II. OVERBREADTH AND VAGUENESS

Plaintiff contends that the statute suffers from both overbreadth and vagueness. Initially, plaintiff contends that the statute is clearly overbroad because on the one hand it applies to all expression which could be construed as advocating, soliciting, imposing, encouraging, or promoting homosexual activities and on the other hand it encompasses all expression of which there is a substantial risk that it will come to the attention of school children or school employees. Additionally, it is plaintiff's contention that the terms used in the statute (advocacy, soliciting, imposing, encouraging and promoting) are overbroad because they encompass constitutionally protected activity.

A statute may be overbroad if, in its reach, it prohibits constitutionally protected conduct. The crucial question is whether the statute sweeps within its prohibitions that which is protected under the First and Fourteenth Amendments. See *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Plaintiff has projected numerous hypothetical circumstances in which the statute would be unconstitutionally overbroad if so applied. However, the issue here is the facial overbreadth. Several courts have observed that a facial overbreadth adjudication is an exception to the traditional rules of practice and its function is a limited one from the outset. See, *Redbluff Drive-In, Inc. v. Vance*, 648 F.2d 1020 (5th Cir. 1981). Application of the overbreadth doctrine in this manner (where the plaintiff has not been injured by the statute's overbreadth) is manifestly strong medicine. The doctrine has been employed by the courts sparingly and only as a last resort. *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973). In fact one Federal Court has recognized that the overbreadth doctrine takes on a special

[APPENDIX]

meaning when regulations concerning public employment are involved.

While the problem of overbreadth in the public employment sphere can raise First Amendment questions, [cite omitted] it does not necessarily require the same remedy as overbreadth in the criminal statutes; specifically, it does not require either a prohibition of any and all penalties, or striking down the regulation, since in matters pertaining to "efficiency of the service" it may be impossible to void a broadly-worded regulation. Deterrence of legitimate speech must be minimized by proper application of the prohibition to activity not protected by the First Amendment. *Waters v. Peterson*, 495 F.2d 91, 99 (D.C. Cir. 1973).

The statute at issue is not overbroad. The plaintiff's arguments have merit and would be persuasive if you consider only the first half of the statute. I have heretofore said that the statute does not place a prior restraint upon constitutionally protected speech. In fact, the statute merely provides that a teacher may be terminated if he engages in public homosexual conduct or activity and is found to be unfit to teach because of that activity. The statute specifically states what factors are to be considered in determining whether the activity causes the teacher to be unfit. Among the factors are: the activities' adverse affect on students and school employees; proximity in time or place of the conduct to the employee's official duties; and whether the activities are of a continuing nature which tends to encourage children toward similar activity. Additionally, prior case law provides that a teacher may be disciplined only when his activities cause a substantial or material disruption of normal school activities. Therefore, the statute is facially free of restrictions on constitutionally protected conduct. Accordingly, the statute is not overbroad. And even if this court held the statute to be overbroad, invalidation of the statute would be improper according to *Waters*.

[APPENDIX]

In addition to the overbreadth argument, plaintiff alleges that the statute is unconstitutionally vague. In particular, plaintiff alleges that the terms "public homosexual conduct" and "public homosexual activity" are not defined with sufficient specificity to provide an individual with fair warning of what is prohibited.

This court finds *Grayned, supra*, to be applicable here. In *Grayned*, the appellant was convicted of violating an anti-noise ordinance. The appellant had participated in a demonstration which occurred immediately adjacent to a school building. The ordinance read as follows:

"[N]o person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof. . . ." 408 U.S. at 107-108.

In his appeal, appellant claimed that the ordinance was vague. The Court said regarding vague laws:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment free-

[APPENDIX]

doms," it operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked." 408 U.S. at 108-109.

In *Grayned*, the Court held that the anti-noise ordinance did not permit punishment for expression of unpopular views and therefore, contained no broad invitation to subjective or discriminatory enforcement. The Court recognized that the vagueness of the terms "noises and diversions" was dispelled by the ordinance's requirements. Those requirements were: that the noise or diversion be incompatible with normal school activity; that there be a relationship between the disruption that occurs within the school and that which occurs outside; and that the acts be willfully done.

As in *Grayned*, the vagueness of the terms "public homosexual activity" and "public homosexual conduct" is dispelled by the unfitness requirement. The vagueness, if any, is even further dispelled by case law requiring a substantial interference and by the list of factors which must be considered in determining unfitness. Those factors are: likelihood that the activity or conduct may adversely affect students or employees; the proximity in time or place of the activity or conduct to teachers, student teachers or teacher's aides official duties; any extenuating or aggravating circumstances; and whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity. Certainly these requirements lend specificity to the terms "public homosexual conduct" and "public homosexual activity." A man of reasonable intelligence can certainly view the statute and determine which acts he should avoid. And the law provides sufficient guidelines that it may neither be arbitrarily applied nor inhibit the exercise of First Amendment freedoms. Accordingly, the statute is not unconstitutionally vague.

III. RIGHT TO PRIVACY

Although plaintiff has presented to this court a strong and detailed argument regarding the right of privacy, it has admitted that the United States Supreme Court has not extended the right of privacy to same-sex activity. However, plaintiff urges this court to extend that right to same-sex activity based upon an opinion by the highest appellate court of New York. *People v. Onofre*, 51 N.Y.2d 476, 415 NE2d 936 (1980).

The issue appeared settled in 1976 when the United States Supreme Court summarily affirmed a ruling that the Virginia sodomy statute was constitutional as applied to private, consensual homosexual behavior. See *Doe v. Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976) *aff'g* 403 F.Supp. 1199 (E.D. Va. 1975). However, the Court subsequently stated in a footnote to a 1977 plurality opinion: "the court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults,' . . . and we do not purport to answer that question now." *Carey v. Population Services Int'l*, 431 U.S. 678, 688 n.5, 97 S.Ct. 2010, 52 L.Ed.2d 75 (1977).

Since the Court's statement in *Carey*, the United States Supreme Court has not specifically addressed the question of whether the right of privacy extends to homosexual activity. A few courts, however, have attempted to answer the difficult question. One such attempt was *Onofre*.

Onofre concerned a constitutional challenge to the New York sodomy statute. This challenge was based upon the equal protection and the right to privacy provisions of the United States Constitution. The New York court held that there was no rational basis to exclude the protection of the right to privacy from those who "seek sexual gratification from what at least once was commonly regarded as 'deviant'

conduct, so long as the decisions are voluntarily made by adults in a noncommercial, private setting."

Although the New York court made a well-researched argument, the opinion is not controlling here because the target statute condemns public, not private homosexual activity. It is merely an opinion of a state appellate court and has no precedential value here. Additionally, that court held that there was no rational basis for not extending the right of privacy to same-sex activity rather than finding a rational reason for extending the protection.

This court is persuaded by the court's reasoning in *Doe, supra*. *Doe* involved a challenge to the Virginia statute making sodomy a crime. In *Doe* the court said:

[t]hat Griswold is premised on the right of privacy and that homosexual intimacy is denunciable by the state is unequivocally demonstrated by Mr. Justice Goldberg in his concurrence, p. 499, 85 S.Ct. 1678 in his adoption of Mr. Justice Harlan's dissenting statement in *Poe v. Ulman*, 367 U.S. 497, 553, 81 S.Ct. 1752 1782, 6 L.Ed2d 989 (1961): 'Adultery, homosexuality and the like are sexual intimacies which the state forbids . . . but the intimacy of husband and wife is a necessarily essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the state exerts its power either to forbid extra marital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.' 403 F.Supp. at 1201.

Although the right of privacy is an evolving constitutional doctrine, the Supreme Court has extended that protection only to the most basic, personal decisions. And the Supreme Court has not been quick to expand those rights

[APPENDIX]

into new fields. See, *East Hartford v. Board of Ed.*, 562 F.2d 838 (2nd Cir. 1977). See also, *Johnson v. San Jacinto Jr. College*, 498 F.Supp. 555, 575 (S.D. Tex. 1980) (holding that an extra-marital relationship is not protected by the right of privacy and stating that the right to privacy in sexual intimacy is grounded on the marriage relation and the right of a person to do as they please with their body encompass aspects of sexual intimacy but does not protect the sexual relations themselves).

Therefore, it is the opinion of this court, based on the foregoing authority, that the right of privacy does not include the activities contemplated by the statute.

IV. EQUAL PROTECTION

Plaintiff, in addition to its other arguments, has alleged that the statute at issue violates the Equal Protection clause of the Fourteenth Amendment.

Before it may be determined whether the statute violates the equal protection clause, it must be determined what the appropriate standard of review is. Those statutes which affect a "suspect" classification or a "fundamental right" must be viewed with strict scrutiny. That is, the statute must be shown to further a compelling state interest before it will survive an equal protection challenge. However, if the statute does not affect a "fundamental right" or "suspect" classification, it must merely be shown to be rationally related to a legitimate state interest.

Initially, plaintiff argues that the statute affects its fundamental right to freedom of speech or that homosexuals are a "suspect" class. This court's analysis in the previous sections of this opinion is dispositive of plaintiff's claim that the statute involves First Amendment speech. Additionally, it should be noted that this court has ruled that the statute does not encompass activities which are entitled to a right of privacy.

[APPENDIX]

It is also clear that homosexuals are not members of a protected class. Traditionally, only those classifications based on race, religion, national origin, or alienage had been considered suspect. And in *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1746, 36 L.Ed.2d 583 (1973) four members of the high court found sex be a suspect class. This court is not aware of any court decision which has held homosexuals to be a suspect class and is unwilling to do so itself in view of the Supreme Court's conservative stance regarding gender. See *Childers v. Dallas Police Dept.*, 513 F.Supp. 134, 147 n.22 (N.D. Tex. 1981); *Fricke v. Lynch*, 491 F.Supp. 381, 388 n.6 (D.R.I. 1980); *Adams v. Howerton*, 486 F.Supp. 1119, 1125 n.5 (C.D. Cal. 1980); *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327, 333, 334 n.1 (9th Cir. 1979).

Therefore, since the statute at issue does not affect a fundamental right or suspect class, the legislation need only bear a rational relationship to a legitimate state interest. It is clear that the legitimate state interest which the statute seeks to further is the fitness of public school teachers. In fact, the Supreme Court has recognized that a teacher's fitness is a legitimate state concern.

There can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools, as this Court before now has had occasion to recognize. "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern." *Adler v. Board of Education*, 342 U.S. 485, 493. There is "no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors." [cite omitted] *Shelton v. Tucker*, 364 U.S. 479, 485, (1960).

Therefore, this court must determine whether the statute at issue is rationally related to the aforementioned goal. One case sets forth very clearly the standards for review which have been enunciated by the Supreme Court of the United States. *National Organization for Reform of Marijuana Laws v. Bell*, 488 F.Supp. 123 (D.D.C. 1980). There, the court stated:

"The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classification will be set aside only if no grounds can be conceived to justify them." *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 809, 89 S.Ct. 1404, 1408, 22 L.Ed.2d 739 (1969). This standard of judicial review gives legislatures wide discretion and permits them to attack problems in any rational manner. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). "In an equal protection case of this type. . . , those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111, 99 S.Ct. 939, 950, 59 L.Ed.2d 171 (1979). The classification will be upheld unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational." *Id.* at 97, 99 S.Ct. at 943. "In short, the judiciary may not sit as a superlegislature to judge the wisdom of desirability of legislative policy determinations made in areas that

neither affect fundamental rights nor proceed along suspect lines. . . ." *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976). 488 F.Supp. at 134-35.

In this case, the plaintiff has fallen short of convincing the court that the legislature's action was irrational. Plaintiff only claims that the statute is not rationally related to a legitimate state goal because the School Board already had the power to dismiss teachers for unfitness. Therefore, plaintiff claims the statute was unnecessary.

It is not within the province of this court to determine whether the statute is superfluous. I must only determine whether the statute is rationally related to a legitimate state goal. As said previously, assuring the fitness of public school teachers is a legitimate legislative goal. The question is whether a statute which concerns public homosexual conduct is rationally related to the goal sought by the legislature. It is the opinion of this court that it is.

In Oklahoma, there is no adequate legislative history with which to determine legislative intent. Therefore, the legislature must be presumed to have acted constitutionally unless there are no grounds upon which to justify its action.

Obviously, the legislature has perceived that public homosexual conduct by a teacher might render him unfit to teach. This is not a totally irrational perception or a clearly erroneous idea. Courts across the nation have dealt with cases involving the discharge of teachers who either claimed to be homosexual or engaged in homosexual activities. See, e.g., *Acanfora v. Board of Ed. of Montgomery County*, 359 F.Supp. 843 (D.Md. 1973); *Morrison v. State Bd. of Ed.*, 82 Cal Rptr. 175, 461 P.2d 375 (1969); *Gaylord v. Tacoma School Dist. No. 10*, 88 Wash.2d 286, 559 P.2d 1340 (1977). See also *Singer v. United States Civil Service Comm'n*, 530 F.2d 247 (9th Cir. 1976), vacated and remanded 429 U.S. 1034, 97 S.Ct. 725, 50 L.Ed.2d 744 (1977),

[APPENDIX]

(held Civil Service Commission could rationally conclude public knowledge that government employed a homosexual would impede efficiency of the Service) and *Norton v. Macy*, 417 F.2d 1191 (D.C. Cir. 1969) (recognizing that the homosexual conduct of an employee might bear upon efficiency).

Therefore, based upon the foregoing cases, the court holds that public homosexual activity likely would affect the efficiency of a teacher. Clearly a teacher's efficiency is related to the performance of his job and hence, his fitness to teach.

Accordingly, the court holds that the statute does not violate the equal protection clause of the United States Constitution because it is rationally related to a legitimate state goal.

V. ESTABLISHMENT CLAUSE

Lastly, plaintiff contends that the statute violates the establishment clause to the First Amendment of the United States Constitution. Plaintiff's claim is premised upon the fact that the statute is based upon Judaeo-Christian beliefs.

In support of the above argument, plaintiff cites two cases which recognize that a statute, based upon religious beliefs, is invalid unless it implements substantial interests beyond promoting the beliefs. See, *Hatheway v. Sec. of the Army*, 641 F.2d 1376 (9th Cir. 1981) and *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). Plaintiff claims that no legitimate, substantial interest for the statute may be found because of the Supreme Court decisions in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, (1965) (holding that a statute which forbid the use of contraceptives violated the right of privacy); *Stanley v. Georgia*, 394 U.S. 557 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) (holding that a law which made private possession of obscene material a crime violated the First Amendment); and *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 1029, (1972) (holding that a law which

[APPENDIX]

provided dissimilar treatment for married and unmarried persons regarding the distribution of contraceptives violated the equal protection clause).

Defendant, on the other hand, contends that the statute serves a contemporary state interest in public education.

The United States Supreme Court has repeatedly recognized one method of determining whether a statute violates the establishment clause. Most recently that method was stated in *Larson v. Valente*, 50 U.S.L.W. 4411 (April 21, 1982).

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), we announced three "tests" that a statute must pass in order to avoid the prohibition of the Establishment Clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances or inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive governmental entanglement with religion.' *Walz [v. Tax Commission]*, 397 U.S. 664, 674, (1970)]" 50 U.S.L.W. at 4417.

It would appear that only the first element of the above test is at issue here. In *McGowan*, the United States Supreme Court was asked to determine the validity of a Sunday closing law, also known as a blue law. Although the Court recognized that the law's original purpose was to aid religion, the court held the law to be valid because of the non-religious arguments asserted for closing on Sunday. The court said:

However, it is equally true that the "Establishment" Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from religious considerations, demands such reg-

[APPENDIX]

ulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy. 366 U.S. at 442.

Therefore, it may be seen that merely because a law coincides with a religious belief does make the law violative of the establishment clause.

McGowan was most recently applied in *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 64 L.Ed.2d 784 (1980). *Harris* involved a challenge to the Hyde Amendment. The amendment severely limited the use of any federal funds to reimburse costs of abortions under the Medicaid program. The challenge, among other things, sought to invalidate the amendment because it incorporated into law the doctrine of the Roman Catholic Church concerning abortions. The Court said:

The Hyde Amendment, as the District Court noted, is as much a reflection of "traditionalist" values towards abortion, as it is an embodiment of the view of any particular religion. 491 F.Supp., at 741. See also *Roe v. Wade*, 410 U.S., at 138-141. In sum, we are convinced that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause. 488 U.S. at 319-20.

Therefore, it is not enough to show that a statute merely coincides with a religious belief. There must also be showing that the statute remains religious in nature.

The case at hand is akin to *Harris*. In this case, the statute at issue is as much a reflection of the traditional values of Oklahoma citizens as it is the religious beliefs of any organization. However, this case differs slightly

[APPENDIX]

from *Harris* because the plaintiff alleges that *Griswold*, *Eisenstadt*, and *Stanley* remove the statute from the field of secular action.

Although the Supreme Court did not address that argument in *Harris*, a district court addressed a similar argument. It was argued that there could be no secular action in view of *Roe v. Wade*. The court said:

While *Roe v. Wade* argues for the measures' invalidity under the Fifth Amendment at least, it does not make the enactments any less secular in their legislative purpose. On its face such legislation, marking explicit disapproval of abortion in most cases, reflects a general and longheld social view even if, as has been held, it goes too far in excluding medically necessary abortions. *McRae v. Califano*, 491 F.Supp. 630, 741 (E.D.N.Y. 1980), *rev'd sub nom. Harris v. McRae*, 448 U.S. 297.

Therefore, based upon *McRae* and its subsequent decision in *Harris*, the statute at issue does not violate the Establishment Clause of the First Amendment to the United States Constitution. The statute does indeed reflect some christian beliefs while implementing traditional values but these things do not invalidate it.

My study of this statute convinces me that many of plaintiff's fears are unwarranted. The Act does not, for example, allow a school board to discharge, declare unfit or otherwise discipline

- a. a heterosexual or homosexual teacher who merely advocates equality for or tolerance of homosexuality;
- b. a teacher who openly discusses homosexuality;
- c. a teacher who assigns for class study articles and books written by advocates of gay rights;
- d. a teacher who expresses an opinion, publicly or privately on the subject of homosexuality; or

[APPENDIX]

- e. a teacher who advocates the enactment of laws establishing civil rights for homosexuals.

If, under the Act, a school board could declare a teacher unfit for doing any of the foregoing or refuse to hire one for similar reasons, it would likely not meet constitutional muster, but since protected expression is not hindered by the Act, I find that plaintiff has failed to demonstrate that it is unconstitutional on its face so deny plaintiff's motion for judgment.

Accordingly,

The prayer of the plaintiff for an order of this court to declare the aforesaid Act unconstitutional is denied.

The Clerk of the Court is directed to mail a copy hereof to counsel of record.

DATED this 29th day of June, 1982.

(s) Luther B. Eubanks
United States District Judge

APPENDIX C

[Filed May 11, 1984]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

THE NATIONAL GAY TASK FORCE)	
and on behalf of all teachers and princi-)	
pals prospectively and presently employed)	
by the Board of Education of the City of)	
Oklahoma City, State of Oklahoma, and)	
who are similarly situated,)	
	)	Plaintiff/
	)	Appellant
vs.	)	No. 82-1912
)	
THE BOARD OF EDUCATION OF THE)	
CITY OF OKLAHOMA CITY, STATE)	
OF OKLAHOMA,)	
	)	Defendant/
	)	Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that the Board of Education of the City of Oklahoma City, the Defendant/Appellee, hereby appeals to the Supreme Court of the United States section II of the final order entered in this action on March 14, 1984.

This appeal is taken pursuant to 28 U.S.C. Sec. 1254(2).

By (s) *Larry Lewis*
Suite 410
4001 N. Lincoln
Oklahoma City, Oklahoma 73105
(405) 521-1276, 521-9033
Attorney for Defendant-Appellee

[Certificate of Mailing omitted this printing]

Office - Supreme Court, U.S.
FILED

JUL 18 1984

No. 83-2030 (2)

ALEXANDER L. STEVENS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

THE BOARD OF EDUCATION OF THE
CITY OF OKLAHOMA CITY,
STATE OF OKLAHOMA,
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

**ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS, TENTH CIRCUIT**

MOTION TO AFFIRM

Attorneys for Appellee:

LEONARD GRAFF*
DONALD C. KNUTSON
NATIONAL GAY RIGHTS
ADVOCATES
540 Castro Street
San Francisco, CA 94114
(415) 863-9156

LELAND R. SELNA, JR.
ROBERT C. GOODMAN
FELDMAN, WALDMAN & KLUGE
2700 Russ Building
235 Montgomery Street
San Francisco, CA 94104
(415) 981-1300

WILLIAM B. ROGERS
AMERICAN CIVIL LIBERTIES
UNION OF OKLAHOMA
6440 Avondale Drive, Suite 200
Oklahoma City, OK 73116
(405) 840-2470

* *Counsel of Record*

BEST AVAILABLE COPY

1388

No. 83-2030

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

THE BOARD OF EDUCATION OF THE
CITY OF OKLAHOMA CITY,
STATE OF OKLAHOMA,

Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS, TENTH CIRCUIT

MOTION TO AFFIRM

Attorneys for Appellee:

LEONARD GRAFF*
DONALD C. KNUTSON
NATIONAL GAY RIGHTS
ADVOCATES
540 Castro Street
San Francisco, CA 94114
(415) 863-9156

LELAND R. SELNA, JR.
ROBERT C. GOODMAN
FELDMAN, WALDMAN & KLEBE
2700 Russ Building
235 Montgomery Street
San Francisco, CA 94104
(415) 981-1300

WILLIAM B. ROGERS
AMERICAN CIVIL LIBERTIES
UNION OF OKLAHOMA
6440 Avondale Drive, Suite 200
Oklahoma City, OK 73116
(405) 840-2470

* *Counsel of Record*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW.....	1
STATEMENT.....	2
SUMMARY OF ARGUMENT	4
ARGUMENT	
A. The Tenth Circuit Correctly Held That 70 Okla. Stat. § 6-103.15 Restricts Protected Expression	5
B. The Tenth Circuit Correctly Held That 70 Okla. Stat. § 6-103.15 Impermissibly Restricts Expression by Public School Teachers	6
C. The Tenth Circuit Correctly Held That 70 Okla. Stat. § 6-103.15 is an Unconstitutionally Overbroad Restriction of Protected Expression.....	7
CONCLUSION	8

TABLE OF AUTHORITIES

	Page
CASES	
<i>Brandenburg v. Ohio</i> 395 U.S. 444 (1969)	5, 6
<i>Chaplinsky v. New Hampshire</i> 315 U.S. 568 (1942).....	6
<i>Connick v. Myers</i> ____ U.S. _____, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)	7
<i>Erznoznik v. City of Jacksonville</i> 422 U.S. 205 (1975)	6, 7
<i>Gooding v. Wilson</i> 405 U.S. 518 (1972).....	7
<i>Pickering v. Board of Education</i> 391 U.S. 563 (1968)	7
<i>Police Department of Chicago v. Mosley</i> 408 U.S. 92 (1972)	6
<i>Tinker v. Des Moines School District</i> 393 U.S. 503 (1969)	7
CONSTITUTIONS	
United States Constitution First Amendment	4, 5, 6, 7
STATUTES	
70 Okla. Stat. § 6-103.15	2, 4, 6, 8

No. 83-2030

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

THE BOARD OF EDUCATION OF THE
CITY OF OKLAHOMA CITY,
STATE OF OKLAHOMA,

Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

**ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS, TENTH CIRCUIT**

MOTION TO AFFIRM

Appellee The National Gay Task Force, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment and decree of the United States Court of Appeals for the Tenth Circuit be affirmed on the grounds the question is so unsubstantial as not to warrant further argument.

OPINIONS BELOW

The March 14, 1984 opinion of the Court of Appeals (Appellant Appendix A (hereinafter App. A), 1a-13a) is reported at 729 F.2d 1270. The June 29, 1982 opinion of the district court (Appellant Appendix B (hereinafter App. B), 1b-22b) is not reported.

STATEMENT

This case involves a facial constitutional challenge of an Oklahoma statute which permits school districts to dismiss public school teachers for making public statements on homosexuality. 70 Okla. Stat. § 6-103.15 provides:

A. As used in this section:

1. "Public homosexual activity" means the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, if such act is:
 - a. committed with a person of the same sex, and
 - b. indiscreet and not practiced in private;
2. "Public homosexual conduct" means advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees; and
3. "Teacher" means a person as defined in Section 1-116 of Title 70 of the Oklahoma Statutes.

B. In addition to any ground set forth in Section 6-103 of Title 70 of the Oklahoma Statutes, a teacher, student teacher or a teacher's aide may be refused employment, or reemployment, dismissed, or suspended after a finding that the teacher or teachers' aide has:

1. Engaged in a public homosexual conduct or activity;
2. Has been rendered unfit, because of such conduct or activity, to hold a position as a teacher, student teacher or teachers' aide.

C. The following factors will be considered in making the

determination whether the teacher, student teacher or teachers' aide has been rendered unfit for his position:

1. The likelihood that the activity or conduct may adversely affect students or school employees;
2. The proximity in time or place the activity or conduct to the teacher's, student teacher's or teachers' aide's official duties.
3. Any extenuating or aggravating circumstances; and,
4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity.

This case was tried before the district court on cross-motions for summary judgment, based on facts established by affidavit. These facts state that appellee, the National Gay Task Force, is a corporation which includes among its membership homosexual teachers employed by the Oklahoma City School District. These teachers wish to advocate civil and constitutional rights for homosexual persons, but are inhibited from expressing public or private opinions on these issues because of the possibility of dismissal from their jobs, or the foreclosure of future employment in the Oklahoma City School District. The National Gay Task Force challenged the statute on a number of constitutional grounds. Judge Luther Eubanks of the United States District Court, Western District of Oklahoma, held the law to be constitutional in all respects. (App. B, 1b-22b.)

The Tenth Circuit reversed, in part, holding that while the statute's restrictions of "public homosexual activity" were constitutional, the statute's restrictions of "public homosexual conduct" were an impermissibly overbroad regulation of protected expression. In short, the Tenth Circuit held that while Oklahoma may dismiss public school teachers who engage in certain sexual activities in public, the state may not dismiss public school teachers for merely speaking out on homosexuality.

The court declared unconstitutional only that portion of the statute which permits dismissal of public school teachers who engage in "public homosexual conduct." Section A(2) of the statute, which defines "public homosexual conduct," is disingenuously written; although it purports to regulate "conduct" it actually restricts speech, by punishing any public school teacher who "advocates, solicits, imposes, encourages or promotes" homosexuality. The Tenth Circuit recognized that the First Amendment protects mere "advocacy" and held that the statute had a "real and substantial" chilling effect on the expression of all Oklahoma public school teachers. The court concluded that the statute was not subject to a "narrowing construction" because by its very terms the statute restricts "advocacy" and other protected expression.¹

SUMMARY OF ARGUMENT

The portion of 70 Okla. Stat. § 6-103.15 held unconstitutional by the Tenth Circuit is clearly an impermissible restriction of protected speech. The statute, by its clear terms, permits the dismissal of public school teachers who "advocate," "promote" or "encourage" homosexuality. The statute does not require that such speech disrupt the school or interfere with the employee's job performance, nor does the statute require a showing that such speech is likely to produce imminent lawless action. The statute, in short, punishes a speaker solely because of the content of his expression.

Appellant Board of Education, unable to challenge the Tenth Circuit's legal analysis, mischaracterizes the statute and appeals to base prejudice. Appellant insinuates that the statute merely protects school children from sexual advances by school teachers. While such behavior is and should be punishable, it is not the subject of this statute. Even a casual reading of 70 Okla. Stat. § 6-103.15 reveals it for what it is: a heavy-handed attempt to limit debate on an important public issue, by forbidding all public school teachers from speaking out on homosexuality, in public or

¹ Judge Barrett dissented. (Appellant App. A, pp. 9a-13a.) In his view, advocacy of homosexual activity "does not merit any constitutional protection" (id. at 11a).

private, at any time and in any place. The First Amendment does not tolerate such far-reaching restrictions of speech.

ARGUMENT

The decision of the Tenth Circuit is plainly correct. The court relied upon a quarter century of Supreme Court jurisprudence in holding that Oklahoma cannot punish public school teachers who make public statements on homosexuality. Appellant is unable to point to a single instance in which the Tenth Circuit's analysis diverges from prevailing authority.

A. The Tenth Circuit Correctly Held That 70 Okla. Stat. § 6-103.15 Restricts Protected Expression

The Oklahoma statute restricts protected expression because it subjects public school teachers to disciplinary procedures and possible dismissal simply for "advocating, soliciting, imposing, encouraging or promoting" homosexuality. The Tenth Circuit correctly applied the applicable law in stating that the First Amendment protects such expression.

The First Amendment protects "advocacy" even of illegal conduct except when "advocacy" is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)

....

"Encouraging" and "promoting," like "advocating," do not necessarily imply incitement to imminent action. A teacher who went before the Oklahoma legislature or appeared on television to urge the repeal of the Oklahoma anti-sodomy statute would be "advocating," "promoting," and "encouraging" homosexual sodomy and creating a substantial risk that his or her speech would come to the attention of school children or school employees if he or she said, "I think it is psychologically damaging for people with homosexual desires to suppress those desires. They should act on those desires

and should be legally free to do so." Such statements, which are aimed at legalizing social change, are at the core of First Amendment protections.

App. A, p. 6a.

Appellant asserts that there is a "substantial federal question" of whether *Brandenburg* applies to advocacy of homosexuality, apparently because the dissenting judge in the Tenth Circuit has declared homosexuality to be "malum in se." (Appellant Brief, p. 12.) Appellant also claims that there is a "substantial constitutional question" of whether "the encouragement, promotion or advocacy of the commission of criminal homosexual sodomy is entitled to any constitutional speech protection." (Appellant Brief, p. 14.) Appellant offers no authority for its novel theory that while the First Amendment protects advocacy of violent revolution, it does not protect advocacy of homosexuality. Such a theory is antithetical to the First Amendment, for "[a]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975), quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Furthermore, it is clear that speech relating to homosexuality does not fall within those narrow categories of speech not entitled to constitutional protection. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The Tenth Circuit correctly held that 70 Okla. Stat. § 6-103.15 restricts protected expression.

B. The Tenth Circuit Correctly Held That 70 Okla. Stat. § 6-103.15 Impermissibly Restricts Expression by Public School Teachers

The Tenth Circuit held that 70 Okla. Stat. § 6-103.15 is an impermissible restriction of the expression of public school teachers because the statute restricts speech without requiring a showing that such speech disrupts the teacher's school or interferes with the teacher's job performance. (App. A at 8a.) The Tenth Circuit based its holding on the well-settled principles of this Court that a public school teacher's speech may be restricted only where there is proof that the speech "would materially and

substantially interfere with the requirement of appropriate discipline in the operation of the school," *Tinker v. Des Moines School District*, 397 U.S. 503, 509 (1969), or where the speech interferes with the performance of teaching duties. *Pickering v. Board of Education*, 391 U.S. 563 (1968). The Tenth Circuit followed this Court's recent teaching "that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, _____ U.S. _____, 103 S. Ct. 1684, 75 L. Ed. 2d 708, 716-17 (1983).

The Tenth Circuit carefully analyzed the statute, and found that it restricts far more than expression which is materially disruptive to the school or a teacher's job performance. The court stated:

The statute does not require that the teacher's public utterance occur in the classroom. Any public statement that would come to the attention of school children, their parents, or school employees that might lead someone to object to the teacher's social and political views would seem to justify a finding that the statement "may adversely affect" students or school employees. The statute does not specify the weight to be given to any of the factors listed. An adverse effect is apparently not even a prerequisite to a finding of unfitness.

(App. A at 8a.)

C. The Tenth Circuit Correctly Held That 70 Okla. Stat. § 6-103.15 Is an Unconstitutionally Overbroad Restriction of Protected Expression

The First Amendment overbreadth doctrine rests on the notion that to be constitutionally valid, a "statute must be carefully drawn or be authoritatively construed to punish only unprotected speech." *Gooding v. Wilson*, 405 U.S. 518, 522 (1972). A statute may be invalidated under this doctrine when it "is not readily subject to a narrowing construction by the state courts . . . , and its deterrent effect on legitimate expression is both real and substantial." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975).

The Tenth Circuit followed these well-settled principles in holding a portion of the Oklahoma statute unconstitutionally overbroad. The Tenth Circuit correctly found that this statute would have a substantial "chilling effect" on the exercise of free speech because "[the statute] applies to all teachers, substitute teachers and teachers' aides in Oklahoma. *To protect their jobs they must restrict their expression.*" (App. A at 7a (emphasis added).)

The Tenth Circuit was also correct in finding that the Oklahoma statute is not "readily subject to a narrowing construction."

[T]he statute by its plain terms is not easily susceptible to a narrowing construction. The Oklahoma legislature chose the word "advocacy" despite the Supreme Court's interpretation of that word in *Brandenburg*.

(App. A, 6a-7a.)

The Tenth Circuit hence correctly applied *Erznoznik* in holding a portion of 70 Okla. Stat. § 6-103.15 to be unconstitutionally overbroad.

CONCLUSION

The opinion below should be affirmed because the Tenth Circuit correctly applied well settled principles of constitutional law and because appellant presents no substantial question for the decision of this Court.

Respectfully submitted,

Attorneys for Appellee:

LEONARD GRAFF*
DONALD C. KNUTSON
NATIONAL GAY RIGHTS
ADVOCATES
540 Castro Street
San Francisco, CA 94114
(415) 863-9156

LELAND R. SELNA, JR.
ROBERT C. GOODMAN
FELDMAN, WALDMAN & KLINE
2700 Russ Building
235 Montgomery Street
San Francisco, CA 94104
(415) 981-1300

WILLIAM B. ROGERS
AMERICAN CIVIL LIBERTIES
UNION OF OKLAHOMA
6440 Avondale Drive, Suite 200
Oklahoma City, OK 73116
(405) 840-2470

* *Counsel of Record*

NOV 15 1984

ALEXANDER L. STEVAS
CLERK

No. 83-2030 (5)

In the Supreme Court of the United StatesOCTOBER TERM, 1984

THE BOARD OF EDUCATION OF THE CITY OF
OKLAHOMA CITY, STATE OF OKLAHOMA,
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

On Appeal from the United States Court of Appeals,
Tenth Circuit

JOINT APPENDIX

LARRY LEWIS

Suite 410
4001 N. Lincoln
Oklahoma City, Oklahoma 73105
(405) 521-1276

*Counsel of Record for Appellant***LAURENCE H. TRIBE**

Harvard University Law School
Griswold Hall 307
Cambridge, Massachusetts 02138
(617) 495-4621

Counsel of Record for Appellee

APPEAL DOCKETED JUNE 9, 1984
PROBABLE JURISDICTION NOTED OCTOBER 1, 1984

15 pp

No. 83-2030

In the
Supreme Court of the United States
OCTOBER TERM, 1984

THE BOARD OF EDUCATION OF THE CITY OF
OKLAHOMA CITY, STATE OF OKLAHOMA,
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

On Appeal from the United States Court of Appeals,
Tenth Circuit

JOINT APPENDIX

TABLE OF CONTENTS

	PAGE
Statement as to not reprinting Opinions of the District Court and Court of Appeals, which were included in the Jurisdictional Statement previously filed with this Court	ii
Relevant Docket Entries	1
Complaint	3
Answer	9
State Statute Found to be Unconstitutional	11

**STATEMENT AS TO NOT REPRINTING
OPINIONS OF DISTRICT COURT
AND COURT OF APPEALS**

The parties have agreed that the following opinions, decisions, judgments and orders have been omitted in printing this Appendix because they appear on the following pages in the Appendix to the Jurisdictional Statement filed with this Court on June 9, 1984:

Opinion of the District Court for the Western District of Oklahoma, dated June 29, 1982 _____ 1b

Opinion of the Court of Appeals for the Tenth Circuit, dated March 14, 1984 _____ 1a

RELEVANT DOCKET ENTRIES

United States District Court for the Western District of Oklahoma, No. CIV-80-1174-E:

10-14-80	Complaint filed
11-20-80	Defendant filed motion to dismiss and brief
1- 8-81	Plaintiff filed brief in opposition to motion to dismiss
2-12-81	Arguments heard on defendant's motion to dismiss, Court takes motion under advisement
4- 1-81	Order granting Commission on Freedom of Speech leave to file amicus curiae brief on behalf of plaintiff
4-13-81	Withdrawal of Stan Easter as plaintiff.
8- 4-81	Order that defendant's motion to dismiss is overruled
9- 9-81	Answer filed
11-18-81	Motion and brief by plaintiff for summary judgment filed
11-19-81	Pretrial
11-25-81	Pretrial
11-25-81	Stipulation made by plaintiff and defendant that there is no genuine issue as to any material fact, that there is no necessity or desirability of an evidentiary hearing or the taking of evidence, and that the Court may decide the issues presented by the pleadings as a matter of law
12- 9-81	Brief of amicus curiae Commission on Freedom of Speech filed
2-16-82	Brief by defendant in opposition to plaintiff's motion for summary judgment filed
4-21-82	Brief by plaintiff in reply to defendant's brief in opposition to plaintiff's motion for summary judgment filed

6-29-82 Memorandum Opinion and Order that prayer of plaintiff for order to declare 70 O.S. Sec. 6-103.15 unconstitutional is denied. Judgment entered in favor of defendant and against the plaintiff

7-26-82 Notice of Appeal filed by plaintiff

8-25-82 Copy of clerk's letter transmitting record on appeal to Court of Appeals

Court of Appeals for the Tenth Circuit, No. 82-1912:

7-29-82 Case docketed

8- 7-82 Docketing statement filed

8-27-82 Record on appeal filed

9-13-82 Motion of Lambda Legal Defense and Education Fund, Inc. to file amicus brief on behalf of Task Force granted

10-19-82 Appellant's brief filed

11- 2-82 Motion of Speech Communication Association to file amicus brief on behalf of Task Force granted. Brief filed.

11- 4-82 Appellee's brief filed

11-18-82 Brief of amicus Lambda filed

11-22-82 Letters consenting to amicus brief of National Gay and Lesbian Rights Project of ACLU filed. Amicus brief filed.

11-20-82 Appellant's reply brief filed

7-22-83 Hearing for oral argument set

9- 8-83 Appellant's additional authority filed

9-12-83 Case argued and submitted

3-14-84 Opinion of majority and dissent signed, filed and published with Judgment reversed

4- 5-84 Mandate issued to district court

5-11-84 Notice of Appeal to Supreme Court filed

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

[Filed Oct. 14, 1980]

THE NATIONAL GAY TASK FORCE,)	
and STAN EASTER, and on behalf of)	
all teachers and principals prospectively)	
and presently employed by the Board of)	
Education of the City of Oklahoma City,)	
State of Oklahoma, and who are similarly	)	CIV-80-
situated,	)	1174-D
)	
Plaintiffs,)	
vs.)	
)	
THE BOARD OF EDUCATION OF THE)	
CITY OF OKLAHOMA CITY, STATE)	
OF OKLAHOMA,)	
Defendant.)	

COMPLAINT

COME NOW the plaintiffs, and for cause of action against the defendant, they allege and state as follows:

JURISDICTION

1. This is an action for declaratory judgment pursuant to Title 28, United States Code, Section 2201, for the purpose of determining a question of actual controversy between the parties as hereinafter more fully appears.

2. Jurisdiction of this action is based on Title 28, United States Code, Section 1331, and the First Amendment, as well as Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States of America. The amount of controversy exceeds \$10,000.00, exclusive of interest and costs.

3. Declaratory judgment is sought for there is at present and currently existing between parties hereto an actual justiciable controversy in respect to which plaintiffs are entitled to have a declaration of their rights and further, they are entitled to immediate relief including a mandatory injunction because of the facts and circumstances hereinafter set out.

PARTIES

4. The National Gay Task Force is a corporation organized and existing under the laws of the State of New York. Its membership consists of homosexual male and female persons throughout the United States and includes both present and prospective teachers and principals of the Oklahoma City School District, which members desire to discuss the subject of homosexuality within such school district, but fear to do so because of the enactment of 70 O.S. §6-103.15. Such members wish to advocate civil and constitutional rights for homosexual persons but fear and are inhibited by their public and private expression of opinion on homosexuality, and on civil liberties for homosexuals because of the possibility of dismissal and/or foreclosure of future employment in the Oklahoma City School District.

5. The plaintiff Stan Easter, is a citizen of the State of Oklahoma, a taxpayer, a resident of the City of Oklahoma City, and a credentialed and duly licensed teacher within the Oklahoma state school system. The plaintiff, Easter, is an individual who is a homosexual person who desires to associate with other homosexual persons, and who desires that the subject of homosexuality be dismissed in the public school system in an open and unbiased fashion, and not according to a prejudged, state-imposed ideology. He personally desires to advocate publicly civil and constitutional rights for all citizens, including homosexual persons, but fears to do so because of the enactment of 70 O.S. §6-103.15. The plaintiff Easter is inhibited in his public

and private expression of opinion on homosexuality and on civil liberties for homosexuals because of the possibility of dismissal or refusal of employment pursuant to 70 O.S. §6-103.15.

CLASS ACTION

6. The plaintiffs, pursuant to Rule 23, Federal Rules of Civil Procedure, bring this action on their own behalf and on behalf of all other teachers and principals employed or prospectively employed by the Oklahoma City School District under the control of the Board of Education of the City of Oklahoma City who are similarly situated. Plaintiffs allege that there are common questions of law and fact affecting the rights of the plaintiffs and the rights of all those similarly situated. Plaintiffs allege that the class is so numerous that joinder of all members as parties plaintiff is impracticable, that the claims of the representative parties are typical of the claims of the class, and the representative parties will fairly and adequately protect the interests of the class.

7. The defendant, Board of Education of the City of Oklahoma City, State of Oklahoma, is vested by statute (70 O.S. § 6-103) with the enforcement and compliance with 70 O.S. § 6-103.15.

CLAIM FOR RELIEF

8. The defendant by statute is required to enforce 70 O.S. § 6-103.15 and plaintiffs' contention that said statute is null and void and constitutionally impermissible creates an actual controversy within the jurisdiction of this court. Plaintiffs have no adequate remedy at law and therefore declaratory and injunctive relief is proper and will adequately and effectively adjudicate the rights of the parties.

9. The promulgation of 70 O.S. § 6-103.15 and the threatened enforcement thereof have caused and will cause plaintiffs unusual hardship and irreparable injury as heretofore set out in Paragraphs 1-7 of the allegations of the parties hereto, and they allege:

Section 6-103.15, Title 70 of the Oklahoma Code is patently unconstitutional on its face under the Oklahoma and Federal Constitutions, and is wholly void and inoperative. In particular:

- (a) The statute punishes constitutionally protected speech and selects certain speech for imposition of sanctions based on its contents.
- (b) It fails to give fair notice of prohibited conduct.
- (c) It does not with sufficient clarity draw a line between protected and unprotected speech; hence it is constitutionally vague and overbroad.
- (d) The statute sets up a non-neutral state ideology and compels school employees to indicate tacit approval thereof, in violation of their liberty of conscience.
- (e) The statute punishes constitutionally protected assembly and association and creates a "chilling effect" inhibiting all teachers and teachers' aides from participating in groups, political campaigns, or association with anyone who advocates rights for homosexuals.
- (f) The statute singles out homosexuals and any teacher associating with them for discriminatory treatment and invites a campaign of harassment against them, and discriminates against a suspect class, homosexuals, in the area of public employment, in violation of constitutional principles of equal protection
- (g) The statute violates the due process and privacy rights of those subject to its sanctions and is therefore in violation of Article II, §§ 2.3 and 22 of the Constitution of the State of Oklahoma, and of the First, Fifth, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States of America.

10. Unless otherwise ordered by this Court, defendant is required to and will enforce 70 O.S. § 6-103.15 and thereby subject plaintiffs, and many other present and prospective teachers, to fitness hearings, dismissals and refusals to hire, inhibiting them and deterring them from exercising their constitutional rights of speech and association.

11. A copy of the Statute is attached hereto, marked Exhibit "A", and made a part hereof by this reference.

WHEREFORE, plaintiffs pray that this Court:

- (a) Enter a Declaratory Judgment declaring that 70 O.S. § 6-103.15 is void and of no effect, unconstitutional, and without force by law; and
- (b) Issue a Preliminary Injunction, restraining defendants, their officers, employees, agents and servants from enforcing this statute, pending a final action/determination of the issues stated herein; and
- (c) Issue a Permanent Injunction, restraining and enjoining said defendant, its officers, employees, agents and servants from exercising or enforcing any portion of this statute; and
- (d) Award plaintiffs' costs, disbursement, and reasonable attorney's fees; and
- (e) Grant such other and further relief as the Court may deem just and proper, and issue all orders necessary to implement the relief ordered by the Court.

DATED this 14th day of October, 1980.

Donald C. Knutson of the
Gay Rights Advocates

William B. Rogers of the
American Civil Liberties
Union of Oklahoma

Attorneys for plaintiffs

EXHIBIT "A"

70 § 6-103.15 SCHOOLS

§ 6-103.15 *Homosexual conduct or activity*

A. As used in this section:

1. "Public homosexual activity" means the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, if such act is:

- a. committed with a person of the same sex, and
- b. indiscreet and not practiced in private;

2. "Public homosexual conduct" means advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees; and

3. "Teacher" means a person as defined in Section 1-116 of Title 70 of the Oklahoma Statutes.

B. In addition to any ground set forth in Section 6-103 of Title 70 of the Oklahoma Statutes, a teacher, student teacher or a teachers' aide may be refused employment, or reemployment, dismissed, or suspended after a finding that the teacher or teachers' aide has:

1. Engaged in public homosexual conduct or activity; and
2. Has been rendered unfit, because of such conduct or activity, to hold a position as a teacher, student teacher or teachers' aide.

C. The following factors shall be considered in making the determination whether the teacher, student teacher or teachers' aide has been rendered unfit for his position:

1. The likelihood that the activity or conduct may adversely affect students or school employees;

2. The proximity in time or place of the activity or conduct to the teacher's, student teacher's or teachers' aide's official duties;

3. Any extenuating or aggravating circumstances; and

4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity.
Added by Laws 1978, c. 189, § 1.

[Caption and title omitted]

ANSWER

COMES NOW the Defendant, the Board of Education of the City of Oklahoma City, and in answer to the Complaint of the Plaintiff, states:

1. The Defendant denies the allegation contained in Paragraph One of Plaintiff's Complaint to the effect that Plaintiff presents a question of actual controversy between the parties.

2. The Defendant denies the allegation contained in Paragraph Two of Plaintiff's Complaint as to jurisdiction of this Court.

3. The Defendant denies the allegations contained in Paragraph Three of Plaintiff's Complaint.

4. The Defendant neither admits nor denies the allegations of Paragraph Four of Plaintiff's Complaint as to Plaintiff's existence, membership, or the desires of its members because the Defendant has no knowledge thereof. The Defendant neither admits nor denies the allegation that Plaintiff's members are inhibited in their expressions, but asserts that it engages in no practice of suppression of freedom of expression among its employees.

5. The Defendant neither admits nor denies the allegations of Paragraph Five of Plaintiff's Complaint because the former Plaintiff Easter has withdrawn from this action.

6. The Defendant denies in Plaintiff's Paragraph Six all allegations to the effect that this lawsuit may be properly brought as a class action. In particular, the Defendant denies that there are common questions of law and fact; that joinder of members of the putative class is impracticable; that there exists numerosity, typicality or commonality of claims; or that the purported representative will fairly and adequately protect the interests of the class.

7. The Defendant admits the allegation contained in Plaintiff's Paragraph Seven.

8. The Defendant denies the allegations contained in Paragraph Eight except to admit that the Defendant is required to enforce the challenged statute, 70 Okla. Stats. Sec. 6-103.15.

9. The Defendant denies the allegations contained in Paragraph Nine of Plaintiff's Complaint.

10. The Defendant again admits it is required to enforce 70 Okla. Stats. Sec. 6-103.15, but denies that such enforcement will subject the putative class of plaintiff's and many other present and prospective teachers to fitness hearings, dismissals and refusals to hire or inhibit and deter them from exercising their constitutional rights of speech and association.

11. The Defendant admits the accuracy of Plaintiff's Exhibit "A" as incorporated into the Complaint by reference.

WHEREFORE, the Defendant prays that this Court deny all manner of reilef sought by the Plaintiffs, whether declaratory, injunctive or otherwise and that Defendant's

costs, disbursements and reasonable attorney's fees be awarded to Plaintiff.

GROVES, BLEAKLEY & TAGUE
ERIC J. GROVES

ATTORNEYS FOR DEFENDANT

[Certificate of Mailing omitted this printing]

THE STATE STATUTE FOUND TO BE
FACIALLY UNCONSTITUTIONAL

70 Okla. Stat. Sec. 6-103.15:

A. As used in this section:

1. "Public homosexual activity" means the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, if such act is:
 - a. committed with a person of the same sex, and
 - b. indiscreet and not practiced in private;
2. "Public homosexual conduct" means advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees; and
3. "Teacher" means a person as defined in Section 1-116 of Title 70 of the Oklahoma Statutes.

B. In addition to any ground set forth in Section 6-103 of Title 70 of the Oklahoma Statutes, a teacher, student teacher or a teachers' aide may be refused employment, or reemployment, dismissed, or suspended after a finding that the teacher or teachers' aide has:

1. Engaged in public homosexual conduct or activity;
 2. Has been rendered unfit, because of such conduct or activity, to hold a position as a teacher, student teacher or teachers' aide.
- C. The following factors will be considered in making the determination whether the teacher, student teacher or teachers' aide has been rendered unfit for his position:
1. The likelihood that the activity or conduct may adversely affect students or school employees;
 2. The proximity in time or place the activity or conduct to the teacher's, student teacher's or teachers' aide's official duties.
 3. Any extenuating or aggravating circumstances; and,
 4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity.
-

No. 83-2030

Office Supreme Court, U.S.

FILED

NOV 15 1984

STEVAS.

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF EDUCATION OF THE CITY OF
OKLAHOMA CITY, STATE OF OKLAHOMA,
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

On Appeal from the United States Court of Appeals,
Tenth Circuit

BRIEF OF APPELLANT

LARRY LEWIS*

4001 N. Lincoln, Suite 410
Oklahoma City, Oklahoma 73105
(405) 521-1276

JAMES B. CROY

P.O. Box 10798
Midwest City, Oklahoma 73140
(405) 737-5673

DENNIS W. ARROW

Oklahoma City University Law School
2501 N. Blackwelder
Oklahoma City, Oklahoma 73106

Attorneys for Appellant

November, 1984

*Counsel of Record

BEST AVAILABLE COPY

49 pp

QUESTIONS PRESENTED

Whether the state statute on its face unconstitutionally infringes upon protected free speech rights of public school teachers.

Whether the state statute is so facially overbroad as to infringe upon the protected free speech rights of public school teachers.

Whether if the state statute is facially overbroad the statute can be so narrowly construed as to uphold the statute's constitutionality.

TABLE OF CONTENTS

QUESTIONS PRESENTED	PAGE i
OPINION BELOW	1
JURISDICTION	1
THE STATE STATUTE FOUND TO BE FACIALLY UNCONSTITUTIONAL	2
CONSTITUTIONAL PROVISION INVOLVED	3
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	7
ARGUMENT:	
I. The Challenged Oklahoma Teacher Fitness Statute Proscribes No Speech Which Is Constitutionally Protected to Public School Teachers	11
A. The Interpretation Placed Upon the Challenged Statute by Tenth Circuit Is At Variance With the Plain Meaning of That Statute	11
B. Alternatively, Should Any Ambiguity Relevant to First Amendment Scrutiny Remain, Then the Court Below Violated Principles of Comity and Federalism by Failing to Abstain or Dismiss	16
C. The Tenth Circuit Committed Reversible Error by Engaging in a Mechanistic Application of the Clear and Present Danger Test	19
1. The appropriate standard of First Amendment Review, even absent the Governmental Employment Factor, requires an inquiry into the imminence and magnitude of the danger of an utterance, balanced against the need for free and unfettered expression	19

TABLE OF CONTENTS CONTINUED

PAGE(S)

2. The free speech rights of public employees are not for all purposes congruent with the free speech rights of the citizenry as a whole, and may be outweighed by the interests of the employer in promoting the efficiency of the public services it performs	22
3. The balancing test applies <i>mutatis mutandis</i> to public school teachers, whose employment has been recognized as especially sensitive by this Court	23
4. Ignoring the balancing test and concomitant guidelines laid down by this Court, the Tenth Circuit erroneously applied a hybrid constitutional standard of review which, as applied by that court, focused almost exclusively on the "clear and present danger" test	27
5. The interests of teachers in advocating, soliciting, imposing, encouraging, or promoting criminal homosexual sodomy in a manner likely to come to the attention of students or co-workers are outweighed by state interests found cognizable by this Court	32
II. The Tenth Circuit Committed Reversible Error by Applying the Remedy of Facial Invalidation to the Challenged Teacher Fitness Statute	36
A. Since the Statute Proscribes no Speech Which Is Constitutionally Protected to Public School Teachers, There Is no Overbreadth Whatsoever Present in Its Sweep	36
B. Alternatively, If Any Overbreadth Is Present in the Statute, It Is Not "Substantial" as That Term Has Been Defined by this Court	37
CONCLUSION	42

TABLE OF AUTHORITIES

Cases	PAGE(S)
<i>Adler v. Board of Education</i> , 342 U.S. 485 (1952)	24, 31
<i>Ambach v. Norwich</i> , 441 U.S. 68 (1979)	24, 31
<i>American Communications Association, C.I.O. v. Douds</i> , 339 U.S. 382 (1950)	29
<i>Baggett v. Bullitt</i> , 377 U.S. 360 (1964)	15
<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969)	8, 9, 15, 28, 41
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973)	7, 10, 37, 38
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954)	24, 31
<i>Canfield v. State</i> , 506 P.2d 987 (Okla. Cr. 1974)	6
<i>Carson v. State</i> , 529 P.2d 499 (Okla. Cr. 1974)	6
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1942)	32
<i>Connick v. Myers</i> , 461 U.S. 138 (1983)	32
<i>Coupeville School District No. 204 v. Vivian</i> , 677 P.2d 192 (Wash. App. 1984)	10, 35
<i>Cox v. New Hampshire</i> , 312 U.S. 569 (1941)	14
<i>Dennis v. United States</i> , 341 U.S. 494 (1951)	19, 29
<i>Erznoznik v. City of Jacksonville</i> , 422 U.S. 205 (1974)	37
<i>Faulkner v. New Ber-Craven County Board of Educa- tion</i> , 316 S.E.2d 281 (N.C. 1984)	23
<i>Fox v. Washington</i> , 236 U.S. 273 (1915)	15, 18
<i>Gay Activists Alliance v. Board of Regents of the University of Oklahoma</i> , 638 P.2d 1116 (Okla. 1981)	33
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972)	14, 17
<i>Hawaii Housing Authority v. Midkiff</i> , 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984)	17
<i>Jackson v. Independent School District No. 16</i> , 648 P.2d 26 (Okla. 1982)	14
<i>Kim v. Coppin State College</i> , 662 F.2d 1055 (4th Cir. 1981)	28, 29

AUTHORITIES CONTINUED

PAGE(S)

<i>Kimble v. Worth County Board of Education</i> , 669 S.W. 2d 949 (Mo. App. 1984)	23
<i>Landmark Communications, Inc. v. Commonwealth of Virginia</i> , 435 U.S. 829 (1978)	8, 16, 19, 21, 25, 28
<i>Moore v. State</i> , 501 P.2d 529 (Okla. Cr. 1972)	6
<i>Morrison v. State Board of Education</i> , 461 P.2d 375 (1969)	35
<i>National Gay Task Force v. Board of Education of The City of Oklahoma City</i> , 729 F.2d 1270 (10th Cir. 1984)	7, 8, 9, 10, 11, 13, 27, 33, 36, 38
<i>New York v. Ferber</i> 458 U.S. 747 (1982)	10, 11, 25, 37, 38, 39, 40, 41
<i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964)	32
<i>Pickering v. Board of Education</i> , 391 U.S. 563 (1968)	9, 10, 14, 15, 25, 26, 28, 31, 32, 33, 34, 36, 38, 41
<i>Railroad Commission of Texas v. Pullman Company</i> , 312 U.S. 496 (1941)	8, 17
<i>Roth v. United States</i> , 354 U.S. 476 (1956)	32
<i>San Dieguito Union High School District v. Commis- sion on Professional Competence</i> , 185 Cal.Rptr. 203 (1982)	10
<i>Shuttlesworth v. Birmingham</i> , 394 U.S. 147 (1969)	14
<i>Tinker v. Des Moines Independent Community School District</i> , 393 U.S. 503 (1969)	9, 31
<i>United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO</i> , 413 U.S. 548 (1972)	9, 15, 22
<i>United States v. Dennis</i> , 183 F.2d 201 (2d Cir. 1950)	29
<i>Waters v. Petterson</i> , 495 F.2d 91 (D.C. Cir. 1973)	40, 41
United States Constitution	
First Amendment	3 & passim

AUTHORITIES CONTINUED

—vi—

PAGE(S)

Statutes

21 Okla. Stat. Sec. 886 _____ 3

70 Okla. Stat. Sec. 6-103.15 _____ 2 & passim

Miscellaneous

Mendelson, *On the Meaning of the First Amendment:
Absolutes in the Balance*, 50 Calif.L.Rev. 821 (1962) 21

Nimmer, *Nimmer on Freedom of Speech* (1984) _____ 40

No. 83-2030

In the
Supreme Court of the United States
OCTOBER TERM, 1984

THE BOARD OF EDUCATION OF THE CITY OF
OKLAHOMA CITY, STATE OF OKLAHOMA,
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

On Appeal from the United States Court of Appeals,
Tenth Circuit

BRIEF OF APPELLANT

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 729 F.2d 1270 and is printed on pages 1a through 13a of the Appendix to the Jurisdictional Statement. The opinion of the United States District Court for the Western District of Oklahoma is not reported and is printed on pages 1b through 22b of the Appendix to the Jurisdictional Statement. (References in this brief to these opinions will be to page numbers in the Jurisdictional Statement rather than to pages of the Joint Appendix.)

JURISDICTION

The judgment of the Court of Appeals was entered on March 14, 1984. The Jurisdictional Statement appealing Section II of the Tenth Circuit majority opinion was filed with this Court on June 9, 1984. Probable jurisdiction was

noted by this Court on October 1, 1984. The jurisdiction of this Court rests upon 28 U.S.C. Sec. 1254(2) since the Court of Appeals held that an Oklahoma Statute was facially overbroad in violation of the First Amendment to the United States Constitution.

**THE STATE STATUTE FOUND TO BE
FACIALLY UNCONSTITUTIONAL**

The challenged statute, 70 Okla. Stat. Sec. 6-103.15, provides:

A. As used in this section:

1. "Public homosexual activity" means the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, if such act is:
 - a. committed with a person of the same sex, and
 - b. indiscreet and not practiced in private;
2. "Public homosexual conduct" means advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees; and
3. "Teacher" means a person as defined in Section 1-116 of Title 70 of the Oklahoma Statutes.

B. In addition to any ground set forth in Section 6-103 of Title 70 of the Oklahoma Statutes, a teacher, student teacher or a teachers' aide may be refused employment, or reemployment, dismissed, or suspended after a finding that the teacher or teachers' aide has:

1. Engaged in public homosexual conduct or activity;
2. Has been rendered unfit, because of such conduct or activity, to hold a position as a teacher, student teacher or teachers' aide.

C. The following factors will be considered in making the determination whether the teacher, student teacher or teachers' aide has been rendered unfit for his position:

1. The likelihood that the activity or conduct may adversely affect students or school employees;
2. The proximity in time or place of the activity or conduct to the teacher's, student teacher's or teachers' aide's official duties.
3. Any extenuating or aggravating circumstances; and,
4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity.

The statute defines "public homosexual activity" as being the commission of the act defined in Section 886 of Title 21 of the Oklahoma Statutes when that act is committed with a person of the same sex and indiscreetly and not in private. 21 Okla. Stat. Sec. 886 is Oklahoma's criminal sodomy statute. That statute provides:

Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment in the penitentiary not exceeding ten (10) years.

CONSTITUTIONAL PROVISION INVOLVED

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech . . .

STATEMENT OF THE CASE

This case concerns a *facial* challenge to the constitutionality of a portion of the Oklahoma Teacher Fitness Statute, 70 Okla. Stat. Sec. 6-103.15. The challenged section empowers Oklahoma school boards to suspend, dismiss, refuse to renew or refuse to employ public school teachers who solicit, impose, encourage, advocate or promote indiscreet criminal homosexual sodomy, when such speech or conduct so adversely affects the occupational performance of that individual as to impede the purposes of public education. The statute lists the considerations which are to be used by the school board in determining whether there is a "nexus" between the proscribed speech or conduct and occupational performance. The specified considerations are the likelihood the teacher's solicitation, etc., may adversely affect school children or school employees; the proximity in time or place to the teacher's duties as a public school teacher; any extenuating or aggravating circumstances involved in the solicitation; and whether the solicitation of criminal, homosexual sodomy is of such a repeated or continuing nature as to tend to encourage or dispose minor school children to commit criminal, homosexual sodomy.

Since this involves a facial challenge no facts are presented to this Court. No facts have been presented that the Oklahoma City Board of Education has used the challenged statute to refuse to hire anyone or to terminate the employment of any employee.

In the District Court, the Task Force contended that, the statute was facially defective because it infringed upon

protected speech, was vague and overbroad, interfered with its members' privacy rights, and violated the Equal Protection and Establishment clauses of the United States Constitution. The District Court, after stipulation by the parties that there were no facts at issue and after presentation of briefs and argument, rejected all of the arguments of the Task Force and entered judgment for the Board of Education.

The Tenth Circuit, in Section I of the majority opinion, affirmed the ruling of the District Court that the statute was not vague, did not interfere with any right to privacy, and did not violate either the Equal Protection or Establishment clause. Further, the appellate court found no constitutional problem in that portion of the statute which permits the discharge of a teacher for engaging in "public homosexual activity", defined in Section (A)(1) of the challenged statute.

In Section II of the Tenth Circuit majority opinion, the court ruled that that portion of the statute permitting employment action against teachers for "public homosexual conduct" infringed upon free speech and was unconstitutionally overbroad. A dissenting opinion would have affirmed the District Court on all grounds.

The section of the statute which the Tenth Circuit majority opinion held to be facially unconstitutional provides that a school board may terminate the employment of, or refuse to hire, those who have engaged in "public homosexual conduct" to such a degree the applicant or teacher would be or is unfit as a teacher. "Public homosexual conduct" is defined in the statute as the advocating, soliciting, imposing,

encouraging or promoting of public or private "homosexual activity" in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees. The statute defines "public homosexual activity" as "the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, if such act is: (a) committed with a person of the same sex, and (b) indiscreet and not practiced in private; . . ."

The commission of an act "defined in Section 886 of Title 21" of the Oklahoma Statutes is the commission of criminal sodomy, *Carson v. State*, 529 P.2d 499 (Okla. Cr. 1974); *Canfield v. State*, 506 P.2d 987 (Okla. Cr. 1973), *appeal dismissed*, 414 U.S. 991 (1973), *rehearing denied*, 414 U.S. 1138 (1973); *Moore v. State*, 501 P.2d 529 (Okla. Cr. 1972), *cert. denied*, 410 U.S. 987 (1972).

Thus, the portion of the statute held by the majority of the circuit to be unconstitutional refers to the advocacy, solicitation, etc., of criminal homosexual sodomy when made in such a manner as to create a substantial risk the solicitation of criminal sodomy comes to the attention of school children or school employees and renders a teacher unfit as a teacher after consideration of the challenged statute's *nexus* requirements.

The majority found that First Amendment rights were infringed because the statutory term "encouraging", "promoting" and "advocating" did not comply with the "imminent lawless action" test of *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The statute was, therefore held to be facially overbroad, and not readily susceptible to a narrowing construction.

The Board of Education has appealed Section II of the Tenth Circuit majority opinion. The Gay Task Force has not petitioned for *certiorari* concerning Section I of the Tenth Circuit majority opinion.

SUMMARY OF ARGUMENT

In the process of facially invalidating the challenged Teacher Fitness Statute, the Tenth Circuit majority committed four fundamental and substantial errors which warrant reversal by this Court.

First, it interpreted the challenged statute so as to deviate from that statute's plain meaning and virtually unavoidable implications. Focusing on the statutory language requiring that the factors articulated therein concerning the *nexus* between the proscribed teacher speech conduct and occupational performance be "considered" in making the requisite determination of unfitness, 70 Okla. Stat. Sec. 6-103.15 (C), the Tenth Circuit majority concluded that "[a]n adverse effect is apparently not even a prerequisite to a finding of unfitness." 729 F.2d 1270, 1275 (10th Cir. 1984); Jurisdictional Statement, Appendix, 8a. The Board of Education respectfully submits that such an interpretation is unnecessarily obtuse, deviates from the statute's plain meaning, and fails to seek the "limiting construction" which this Court has required lower courts to do where facial invalidation of previously unconstrued state statutes is sought. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). The Board of Education further submits that quantum leaps of reasoning are not required to conclude that what a statute requires to be considered it also requires to be applied.

Such a conclusion was easily reached by the District Court below. Jurisdictional Statement, Appendix, 6b, 9b.

Second, the Tenth Circuit majority erred, even assuming *arguendo* the impropriety of its drawing the conclusion urged above, in failing to abstain, pending certification of the issue to the Supreme Court of Oklahoma, 20 Okla. Stat. Sec. 1602, or dismiss. This Court has long recognized that principles of comity, federalism, and judicial economy require federal judicial abstention especially where the challenging party seeks facial invalidation of a previously uninterpreted state statute. See *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496, 500-502 (1941). While abstention may be avoided by establishing that no alternative to federal adjudication is open, a state court alternative is open where a state court interpretation of a previously unapplied statute may obviate the necessity of pursuing the federal constitutional claim.

Third, the Tenth Circuit majority erred by applying a hybrid standard of First Amendment review of the speech applications of the challenged statute which focused to an impermissible degree on whether the proscribed speech included speech which did not create a clear and present danger of imminent lawless action. See 729 F.2d 1270, 1274 (10th Cir. 1984); Jurisdictional Statement, Appendix, 6a-7a. In giving virtually controlling weight to the First Amendment test established by *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), the Tenth Circuit failed to note that that test has been limited by this Court, even where criminal penalties are imposed, in *Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829, 841 (1978), and especially in cases where governmental employment in gen-

eral — and public school teacher speech in particular — are involved. *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548, 564 (1972); *Pickering v. Board of Education*, 391 U.S. 563, 568-574 (1968). In these cases, this Court articulated a balancing standard of First Amendment review, and further established specific factors to be considered in determining whether particular public school teacher speech enjoyed constitutional protection. *Id.* at 570-574. After engrafting the inapposite “material or substantial disruption of normal school activities” approach of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), (inapposite because that case did not deal with public school teacher speech) onto the *Pickering* balancing approach, the Tenth Circuit majority proceeded to conclude, essentially, that the statutory requirements (as it interpreted them) did not satisfy the *Brandenburg* and *Tinker* tests. See 729 F.2d 1270, 1274-1275 (10th Cir. 1984); Jurisdictional Statement, Appendix, 6a-8a. This conclusion was reached, of course, as a matter of law, and in the context of the facial nature of the instant challenge. The Board of Education respectfully submits that, by pursuing this analysis, the Tenth Circuit majority failed to adequately consider the special factors which this Court concluded in *Pickering* should be considered with particularity in the special circumstances presented by public school teacher speech. In any case, any *Pickering* analysis based on incorrect interpretations of the challenged statute would, produce, of course, incorrect results.

Finally, the Tenth Circuit majority erred in facially invalidating the challenged statute. The Board of Educa-

tion will strongly urge, of course, that the proper application of the proper standard of review to the statute, properly construed, inevitably results in the conclusion that no facial overbreadth exists in the challenged statute at all. This conclusion is buttressed by the breadth necessarily inherent in the balancing factors articulated by this Court in *Pickering*. In fact, the statutory nexus language tracks, virtually verbatim, the embellishing factors articulated by the lower courts (and approved with unwavering consistency on appeal) in applying the *Pickering* approach. See, e.g., *San Dieguito Union High School District v. Commission on Professional Competence*, 185 Cal. Rptr. 203, 205 (1982); *Coupeville School District No. 204 v. Vivian*, 677 P.2d 192 (Wash. App. 1984).

Nevertheless, if any overbreadth remains in the statute as properly interpreted, the Board of Education respectfully submits that such overbreadth is not "substantial" as that term has been applied by this Court. See *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973); *New York v. Ferber*, 458 U.S. 747, 767 (1982). Indeed, the Tenth Circuit majority, while facially striking the section of the challenged statute which proscribed "advocating, soliciting, imposing, encouraging, or promoting" criminal homosexual sodomy did not even consider the extent to which the proscriptions against soliciting or imposing criminal homosexual sodomy might affect the substantial overbreadth calculus, erroneously analyzing the statute as one which exclusively regulated "pure speech". 729 F.2d 1270, 1274, (10th Cir. 1984). Rather than adequately examining the scope of the potential overbreadth presented by the statutory proscriptions against "advocating, . . . encouraging, or promoting" criminal homo-

sexual sodomy in light of the apposite *Pickering* standard of review, it dismissed the Board of Education's "substantial overbreadth" contention in conclusory terms. The Board of Education maintains that the challenged Teacher Fitness Statute is one which, if overbroad at all, has a legitimate sweep which "dwarfs its arguable impermissible applications", *New York v. Ferber*, 458 U.S. 747, 773 (1982), and should be facially upheld, on the merits, by this Court.

ARGUMENT

I. THE CHALLENGED OKLAHOMA TEACHER FITNESS STATUTE PROSCRIBES NO SPEECH WHICH IS CONSTITUTIONALLY PROTECTED TO PUBLIC SCHOOL TEACHERS.

A. The Interpretation Placed Upon the Challenged Statute by Tenth Circuit Is At Variance With the Plain Meaning of That Statute.

The challenged statute, 70 Okla. Stat. Sec. 6-103.15, does no more than to preclude public school teachers from advocating, soliciting, imposing, encouraging, or promoting homosexual sodomy (criminalized by 21 Okla. Stat. Sec. 886) in a manner which impedes the broad purposes of public education which the Oklahoma Legislature may validly protect. At the outset, it must be noted that as the opinion under appeal here, *National Gay Task Force v. Board of Education of Oklahoma City*, 729 F.2d 1270 (10th Cir. 1984) [hereinafter Tenth Circuit majority], did not specifically address the statutory language "soliciting or imposing," it must be assumed that that court found teacher solicitation or imposition of criminal homosexual sodomy to be speech or conduct unprotected to public school teach-

ers by the First Amendment. 729 F.2d 1274; Jurisdictional Statement, Appendix, page 7a. Thus, only that portion of the statute proscribing "advocating, encouraging, or promoting" criminal homosexual sodomy will be directly addressed at this point.

Appellant [hereinafter Board of Education] respectfully submits that the statute proscribes such speech or conduct only when the broad purposes of public education (described in detail in Proposition I-C-3 *infra*) are impeded by the teacher's utterance or conduct. The Board of Education further submits that this conclusion is evidenced by the plain meaning of the five *nexus* requirements of the statute (so described because they require a *nexus* between the teacher's speech or conduct and occupational performance before the statute's penalties may be imposed), which were virtually ignored, or at best misconstrued, by the Tenth Circuit majority below. See 729 F.2d 1270, 1274-1275, Jurisdictional Statement, Appendix, pp. 6a-8a.

The first of the challenged statute's *nexus* requirements is contained in 70 Okla. Stat. Sec. 6-103.15(A)(2), and excludes from the statute's proscriptions any utterance or conduct which is not performed "in a manner that creates a substantial risk that . . . [it] will come to the attention of school children or school employees . . .". The second through fifth *nexus* requirements are contained in the next section of the challenged statute in the following language:

The following factors will be considered in making the determination whether the teacher, student teacher, or teachers' aide has been rendered unfit for his position:

1. The likelihood that the activity or conduct may adversely affect students or school employees;

2. The proximity in time or place of the activity or conduct to the teacher's, student teacher's, or teachers' aide's official duties;
3. Any extenuating or aggravating circumstances; and
4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity.

Id. Sec. 6-103.15(c).

The Tenth Circuit majority reasoned as follows in evaluating the extent to which these *nexus* requirements narrowed the broader proscriptions contained in Sec. 6-103.15 (A):

The statute does not specify the weight to be given to any of the factors listed. An adverse effect is apparently not even a prerequisite to a finding of unfitness. A statute is saved from a challenge to its overbreadth only if it is "readily subject" to a narrowing construction. It is not within this Court's power to construe and narrow state statutes

729 F.2d at 1275; Jurisdictional Statement, Appendix p. 8a.

Several observations may be made concerning this analysis.

First, while it is true that the statute only literally requires the last four *nexus* requirements to "be considered in making the determination [of unfitness]," the Board of Education respectfully submits that only the most obtuse reading of the statute would permit its interpretation so as to require a consideration of factors which could then be ignored in making the requisite finding of unfitness. This is especially true in light of the fact that Oklahoma requires its hearing officers to make written findings of fact

for purposes of appeal in both probationary and nonprobationary teacher dismissal proceedings. *Jackson v. Independent School District No. 16*, 648 P.2d 26, 32 (Okla. 1982) (probationary teachers); 70 Okla. Stat. Sec. 6-103.11 (tenured teachers). Moreover, since this case was brought by Appellee [hereinafter Gay Task Force] by way of a facial challenge, prior to any interpretation of the challenged statute by the Oklahoma Supreme Court (and, for that matter, prior to the invocation of the statute by any school board in any way), it may fairly be said that the interpretation urged by the Board of Education is not inconsistent with any of the statute's prior applications or interpretations. Compare *Cox v. New Hampshire*, 312 U.S. 569, 574-577 (1941), with *Shuttlesworth v. Birmingham*, 394 U.S. 147, 155-159 (1969). In any case, given the miniscule leap of reasoning required to conclude that what the statute requires to be considered it also requires to be employed as a partial basis for decision, it is respectfully submitted that the Tenth Circuit committed reversible error in not finding the statute "readily subject" to narrowing construction. See *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). Finally, while the Tenth Circuit majority's observation that the statute does not specify the weight to be given to any of the *nexus* factors (other than the first) is manifestly correct, it is also true that this Court, in establishing the "guidelines" for balancing free speech interests in teacher speech cases, did not specify the weight to be accorded the various competing interests. See *Pickering v. Board of Education*, 391 U.S. 563, 570-574 (1968) (to be discussed more fully in Proposition I-C-3 *infra*). In any case, how such a specification might practically be accomplished is a question the answer to which is not readily apparent. In

short, the words "advocating, soliciting, imposing, encouraging, or promoting" must not be taken out of context: the five *nexus* requirements of the statute are as much a part of the statute as the verbs cited above.

Sixty years ago, Justice Holmes wrote for a unanimous Court in *Fox v. State of Washington*, 236 U.S. 273 (1915), that

[s]o far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed; *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407, 408; and it is to be presumed that state laws will be construed in that way by the state courts.

Id. at 277; *c.f. Baggett v. Bullitt*, 377 U.S. 360, 375 (1964). The policies of federalism, comity, and judicial economy expressed by this premise are as valid today as they were in 1915. These policies are especially apposite where — as here — any constitutionally relevant ambiguity is *de minimis* at most.

Since the other purported ambiguity relates to whether the statutory proscription against public school teachers "advocating, . . . encouraging, or promoting" criminal homosexual sodomy precludes any speech which does not create a clear and present danger of incitement to "imminent lawless action," *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), and since the Board of Education will vigorously maintain in Proposition I-C, *infra*, that the Tenth Circuit majority's reliance on *Brandenburg* was misplaced, *see, e.g., Pickering v. Board of Education*, 391 U.S. 563, 568-574 (1968); *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548, 564

(1972); *Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829, 841 (1978), this purported ambiguity will not be addressed at this point.

B. Alternatively, Should Any Ambiguity Relevant to First Amendment Scrutiny Remain, Then the Court Below Violated Principles of Comity and Federalism by Failing to Abstain or Dismiss.

The Board of Education will maintain, of course, that the challenged statute's proscriptions, read in light of the *nexus* requirements described above, contain no ambiguity whatsoever, or, at most, an ambiguity so miniscule as to be "readily subject" to narrowing construction by this Court. This result was accomplished, without the necessity for great feats of logical gymnastics, in the District Court below. See, Jurisdictional Statement, Appendix, 6b, 9b. Nevertheless, should this Court disagree, the Board of Education respectfully submits that the appropriate remedy, even at this stage of the judicial proceedings, is either dismissal or abstention, with certification of any residually relevant question of law to the Supreme Court of Oklahoma pursuant to 20 Okla. Stat. Sec. 1602, which provides, in relevant part, that

[t]he Supreme Court . . . may answer questions of law certified to it by the Supreme Court of the United States, . . . when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court or the Court of Criminal Appeals of this state.

This Court has long recognized that principles of comity and federalism require federal judicial abstention especially where the challenging party seeks facial invalidation of an unconstrued state statute. See *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496, 500-502 (1941) [hereinafter *Pullman*]. *Pullman's* abstention is avoidable, of course, in only two circumstances. The first, as has been indicated, arises in those cases in which a statute is readily subject to narrowing construction, *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)—precisely the situation which the Board of Education urges is at issue in this case. Alternatively, abstention may be avoided by establishing that "no alternative to [federal] adjudication is open." *Pullman*, *supra*, 312 U.S. 496, 498 (1941). A state court alternative is open, however, where state court interpretation of a previously unapplied statute may permit the avoidance of the federal constitutional claim. See, e.g., *Hawaii Housing Authority v. Midkiff*, — U.S. —, 104 S.Ct. 2321, 2327, 81 L.Ed.2d 186, 194 (1984) [hereinafter *Midkiff*]. In *Midkiff*, Justice O'Connor wrote for a unanimous Court that

the relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts *might* render adjudication of the federal question unnecessary. Rather, "[w]e have frequently emphasized that abstention is not to be ordered unless the statute is obviously susceptible of a limiting construction." *Zwickler v. Koota*, 389 U.S. 241, 251, and n.14 . . . (1967).

104 S.Ct. 2321, 2327, 81 L.Ed.2d 186, 195 (1984). In the instant case, the possibility that the Oklahoma Supreme Court would interpret the statute to require the presence of at least one of the four *nexus* factors which materially affects occupational performance before the statutory pen-

alties may be invoked, can hardly be said to be remote. In fact, caselaw *already* provides that a teacher may be disciplined only when his activities cause a substantial impairment of a teacher's occupational effectiveness. See District Court opinion, Jurisdictional Statement, Appendix, 9b.

In sum, the Board of Education respectfully submits that any ambiguity in the challenged statute concerning whether the last four *nexus* requirements described above must be present, in any quantity, before the statute's penalties may be imposed, may be readily resolved by a full, fair, and contextual reading of the statutory language itself. Any ambiguity concerning whether the statute proscribes speech or conduct which does not constitute incitement to imminent lawless action coupled with a clear and present danger of such action is irrelevant, provided that the Board of Education can sustain the application of the balancing test to public school teacher speech, and provided further that it can establish that teacher interests in advocating, encouraging, or promoting criminal homosexual sodomy are outbalanced by legitimate state interests in effective public education. Should this Court conclude that an ambiguity concerning the potency of the *nexus* requirements persists, it should assume that the Oklahoma Supreme Court would resolve it in a constitutional manner when presented with actual facts, *Fox v. Washington*, 236 U.S. 273, 277 (1915), abstain and certify the issue to the Oklahoma Supreme Court for resolution, 20 Okla. Stat. 1602, or dismiss.

The proper application of the proper standard of review to the statute, properly construed, may now be more fully addressed.

C. The Tenth Circuit Committed Reversible Error by Engaging in a Mechanistic Application of the Clear and Present Danger Test.

- 1. The appropriate standard of First Amendment Review, even absent the Governmental Employment Factor, requires an inquiry into the imminence and magnitude of the danger of an utterance, balanced against the need for free and unfettered expression.**

In *Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829 (1978) [hereinafter *Landmark*], this Court cautioned against mechanistic applications of the "clear and present danger" test as a boilerplate standard of first amendment review, even where *criminal* penalties were imposed on speech. Speaking for the Court, Chief Justice Burger wrote:

... we cannot accept the mechanical application of the [clear and present danger] test which led the [lower] court to its conclusion. Mr. Justice Holmes' test was never intended "to express a technical legal doctrine or to convey a formula for adjudicating cases." *Pennekamp v. Florida*, 328 U.S. 331, 353, 90 L.Ed. 1295, 66 S.Ct. 1029 (1946) (Frankfurter, J., concurring). 435 U.S. 829, 841.

Justice Frankfurter embellished his basic first amendment approach, the outlines of which have now been endorsed by this Court, concurring in *Dennis v. United States*, 341 U.S. 494, 517 (1951) [hereinafter *Dennis*]:

The language of the First Amendment is to be read not as barren words . . . but as symbols of historic experience illuminated by the presuppositions of those who employed them. Not what words did Madison and Hamilton use, but what was it in their minds which

they conveyed? Free speech is subject to prohibition of those abuses of expression which a civilized society may forbid. As in the case of every other provision of the Constitution that is not crystallized by the nature of its technical concepts, the fact that the First Amendment is not self-defining . . . neither impairs its usefulness nor compels its paralysis as a living instrument. *Id.* at 523.

In fact, even the earlier first amendment cases, which purported to apply the "clear and present danger" approach objectively and with certitude, were explicable with equal ease pursuant to a balancing approach. As Justice Frankfurter noted in his *Dennis* concurrence,

The complex issues presented . . . have been resolved by scrutiny of many factors besides the imminence and gravity of the evil threatened. The matter has been well summarized by a reflective student of the Court's work. "The truth is that the clear-and-present-danger test is an oversimplified judgment unless it takes account also of a number of other factors: the relative seriousness of the danger in comparison with the value of the occasion for the speech or political activity; the availability of more moderate controls . . .; and perhaps the specific intent with which the speech or activity is launched. No matter how rapidly we utter the phrase 'clear and present danger', or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms which the judge must disentangle." Freund, *On Understanding the Supreme Court* 27-28. *Id.* at 542, 543.

In short, balancing compels, a judge to take full responsibility for his decisions, and to provide a full, particu-

larized, and rational explanation of their method of arrival — more particularized and rational than the "familiar parade of hallowed abstractions, elastic absolutes, and selective history." Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 Calif. L.Rev. 821, 825 (1962). This, too, was noted by Justice Frankfurter in his *Dennis* concurrence, wherein he noted that

[a]bsolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. The demands of free speech . . . are better served by candid and informed weighing of the competing interest, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved. 341 U.S. 494, 524-525 (1951) (Frankfurter, J., concurring).

Thus, in defining the appropriate standard of review in *Landmark*, Chief Justice Burger held that:

[p]roperly applied, the test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the states' interests should also be weighed. 435 U.S. 829, 842-843 (1978).

It is assumed that this Court did not intend the *Landmark* balancing formula to be applied in a rigid or mechanistic fashion; thus, the Board of Education respectfully submits that the non-criminal nature of the penalties provided by the Oklahoma Teacher Fitness Statute should also be weighed in the balance. It is further submitted that the

United States Court of Appeals for the Tenth Circuit committed reversible error by failing to correctly apply this standard of review in the instant case.

2. The free speech rights of public employees are not for all purposes congruent with the free speech rights of the citizenry as a whole, and may be outweighed by the interests of the employer in promoting the efficiency of the public services it performs.

This Court has recognized certain rights of the government-employer to control speech and related activities of its employees to a greater degree than that of citizens in general, even when such employee acts occur away from the workplace. For example, in *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 U.S. 54 (1972), this Court reaffirmed the proscriptions on federal employees' speech after balancing the government's interest in employment efficiency against the interests of the employees in free and unfettered speech. *Id.* at 564. Weighing in favor of the Hatch Act's controls were the governmental interests in the administration of law in accordance with the will of Congress rather than the will of a political party, the interest in avoiding the appearance of impropriety, the interest in avoiding the misuse of the government for purposes of building a powerful political machine, and the interest in merit employment and advancement. These interests, the Court held, permitted governmental regulation of federal employees' speech and speech related activities such as circulating partisan nominating petitions, soliciting votes for political candidates, serving as political convention delegates, actively partic-

pating in fund raising for a candidate or party, actively managing the campaign of a partisan candidate, and organizing political clubs or parties. All these activities, of course, enjoy First Amendment protection when performed by members of the citizenry as a whole.

3. The balancing test applies *mutatis mutandis* to public school teachers, whose employment has been recognized as especially sensitive by this Court.

Because of the unique responsibilities which teachers have for helping to develop the impressionable minds and mores of minor children, the speech and conduct of public school teachers has been subject to even closer scrutiny than governmental employees as a whole. For example, in *Kimble v. Worth County Board of Education*, 669 S.W.2d 949 (Mo. App. 1984), a Missouri Court of Appeals noted that teachers "occupy positions which bring them in close, daily contact with young persons of an impressionable age." *Id.* at 953. Similarly, in *Faulkner v. New Bern-Craven County Board of Education*, 316 S.E.2d 281 (N.C. 1984), the North Carolina Supreme Court stated:

We do not hesitate to conclude that these men and women are intended by parents, citizenry and lawmakers alike to serve as good examples for their young charges. Their character and conduct may be expected to be above those of the average individual not working in so sensitive a relationship as that of teacher to pupil. It is not inappropriate or unreasonable to hold out teachers to a higher standard of personal conduct, given the youthful ideals they are supposed to foster and elevate. *Id.* at 291.

This Court has also recognized the significance of the governmental interest in providing fit and competent teachers. In *Adler v. Board of Education*, 342 U.S. 485 (1952), it held that

[a] teacher works in a sensitive area in a schoolroom. There he shapes the attitude towards the society in which they live. In this, the state has a vital concern. *Id.* at 493.

Speaking for this Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren described public education as:

perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. *Id.* at 493.

More recently, Justice Powell, writing for the majority in *Ambach v. Norwick*, 441 U.S. 68 (1979), noted that:

Within the public school system, teachers play a critical role in developing students' attitudes toward government and understanding of the role of citizens in our society. . . . Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is critical to the continued good health of a democracy. *Id.* at 78, 79.

Justice White, in the opinion of this Court in *New York v. Ferber*, 458 U.S. 747 (1982), further recognized that, even outside of the public school context, constitutional principles have been applied with special solicitude for the welfare of impressionable minor children:

It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor is compelling." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. In *Prince v. Massachusetts*, *supra*, the Court held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the state's effect on a First Amendment activity. In *Ginsburg v. New York*, *supra*, we sustained a New York law protecting children from exposure to nonobscene literature. Most recently, we held that the Government's interest in the "well being of its youth" justified special treatment of indecent broadcasting received by adults as well as children. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). *Id.* at 756-757.

Consequently, this Court adopted a balancing test in determining the perimeters of protected speech by public school teachers, both inside and outside the classroom, over ten years prior to its adoption in *Landmark*, *supra*, of a balancing formula for free speech cases generally. *Pickering v. Board of Education*, 391 U.S. 563 (1968) [hereinafter *Pick-*

ering]. In that case, Justice Marshall, writing for the Court, held that:

the State has interests in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Id.* at 568.

The *Pickering* Court articulated five factors to assist future courts in applying its balancing approach: the need to remove teachers whose speech impedes their occupational effectiveness; the need to maintain employee discipline; the need to preserve harmony among co-workers; the need for personal loyalty and confidence requisite to particularly close employment relationships; and the extent of the public interest in free and unfettered expression of the particular utterance itself. *Pickering, supra*, at 570-574. No suggestion is intended, of course, that this list purports to be exhaustive. Again, however, it must be emphasized that the test articulated in *Pickering* permits the outweighing of public school teacher free speech rights, *even where the speech would be constitutionally protected if uttered by a member of the citizenry as a whole.*

4. Ignoring the balancing test and concomitant guidelines laid down by this Court, the Tenth Circuit erroneously applied a hybrid constitutional standard of review which, as applied by that court, focused almost exclusively on the "clear and present danger" test.

Excluding the "overbreadth" analysis (to be discussed in Propositions II and III *infra*), the reasoning of the Tenth Circuit concerning the standard of review applicable to public school teacher speech is worth reproducing here in full:

The First Amendment protects "advocacy" even of illegal conduct except when "advocacy" is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The First Amendment does not permit someone to be punished for advocating illegal conduct at some indefinite future time. *Hess v. Indiana*, 414 U.S. 105, 109 (1973). . . . We recognize that a state has interests in regulating the speech of its teachers that differ from its interests in regulating the speech of the general citizenry. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). But a state's interests outweigh a teacher's interests only when the expression results in a material or substantial interference or disruption in the normal activities of the school. See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). This Court has held that a teacher's First Amendment rights may be restricted only if "the employer shows that some restriction is necessary to prevent the disruption of official functions or to insure effective performance by the employee." *Childers v. Independent School District No. 1*, 676 F.2d 1338, 1341 (10th Cir. 1982). *National Gay Task Force v. Board of Education of Oklahoma City*, 729 F.2d 1270, 1274 (10th Cir. 1984) (Jurisdictional Statement, Appendix 6a-7a).

Several threshold observations concerning the Tenth Circuit majority's analysis may be advanced at this point.

First, the starting point for that court's analysis was manifestly *Brandenburg*, not *Pickering*. While the Board of Education will maintain that *Brandenburg* is completely inapposite both since that case dealt with a criminal prosecution of an individual who was not a public school teacher (or, for that matter, a governmental employee at all), and since *Brandenburg's* reach has now apparently been limited by *Landmark's* balancing approach, this conclusion is not essential to its argument-in-chief. Since the balancing factors in *Landmark* and *Pickering* did not purport to be exclusive (lest the balancing test, too, fall prey to the danger of mechanistic jurisprudence), it may be conceded, *arguendo*, that, the "clear and present danger" formulation might well be applied as one factor in the balance.

For example, in *Kim v. Coppin State College*, 662 F.2d 1055 (4th Cir. 1981), a college professor alleged school retaliation for his participation in a student boycott and picketing. The court, in determining whether his speech was protected, used *Pickering's* balancing test, but included *Brandenburg's* clear and present danger formulation as one factor in the requisite balancing process:

In applying the *Pickering* analysis to this case, we note at the outset that the activity engaged in by Professors Kim and Bright is within the ambit of the first amendment. Professor Bright spoke to students about their boycott and allegedly offered them counsel. It is nowhere alleged he incited them to boycott or encouraged them to engage in disorderly conduct. *Id.* at 1065.

After using the "clear and present danger" approach, in part, to determine *whether the speech would have been protected if uttered by a member of the citizenry as a whole*, the Fourth Circuit proceeded to examine the *Pickering* factors to determine *whether the professor's free speech interest was outbalanced by the countervailing governmental interests involved*. 662 F.2d at 1065.

In the instant case, the Board of Education will maintain that, even assuming the cognizability of "clear and present danger" analysis as a legitimate *Pickering* factor, it, too, weighs in favor of sustaining the challenged statute. The classical statement of the formula, adopted by this court in *Dennis v. United States*, 341 U.S. 494 (1951), was first articulated by Chief Judge Learned Hand of the Second Circuit Court of Appeals in *United States v. Dennis*, 183 F.2d 201 (1950). After noting that this Court, in *American Communications Association, C.I.O. v. Douds*, 339 U.S. 382, 394 (1950), cautioned against applying the "clear and present danger" test "as a mechanical test . . . without regard to the context of its application", 183 F.2d at 211, Chief Judge Hand established its content as follows:

In each case, [the courts] must ask whether the gravity of the "evil", discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. 183 F.2d at 212.

The Board of Education will maintain that the substantive evil which the Oklahoma legislature had a right—and probably a duty—to prevent consists not only in the danger that impressionable school children will imminently commit the crime of homosexual sodomy, but also the dangers that the educational process will be disrupted, that the

students' normal process of social integration may be impaired, and that school children will develop the attitude that law violation in general is socially acceptable conduct.

The Board of Education submits that these evils are so grave that, even assuming their relative improbability based on speech precluded by the Teacher Fitness Statute, a reasonable "clear and present danger" application as one of the factors in the *Pickering* balance would weigh in favor of sustaining it.

The Board of Education does not concede, however, the improbability of reaping the above described evils when the Teacher Fitness Statute is breached. As has been indicated, the statute is narrowly drawn so as to proscribe within its sweep only the advocacy, solicitation, imposition, encouragement, or promotion of criminal homosexual sodomy "in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees." 70 Okla. Stat. Sec. 6-103.15(A) (2). Moreover, the statute further requires a finding that the teacher has been rendered unfit, by virtue of the proscribed speech or conduct, to hold an instructional position, *id.*, Sec. 6-103.15(B) (2), which determination, in turn, is based on the factors provided in *id.*, Sec. 6-103.15(c):

The following factors will be considered in making the determination whether the teacher, student teacher, or teachers' aide has been rendered unfit for his position:

1. The likelihood that the activity or conduct may adversely affect students or school employees;
2. The proximity in time or place of the activity or conduct to the teacher's, student teacher's, or teachers' aides official duties;

3. Any extenuating or aggravating circumstances; and,
4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity.

These additional limitations and qualifications on the statute's sweep, which the Board of Education submits relate to legitimate state concerns, will be referred to herein as the statute's *nexus* requirements, as they require a probable causal link between the proscribed activity or conduct and efficient, teacher performance as measured by the broad goals of public education described by this Court in *Adler*, *Brown*, *Ambach* and *Pickering*. *Only after their satisfaction may the penalties imposed by the statute be imposed.* The narrow focus of the *nexus* requirements clearly establishes a sufficient likelihood of reaping the substantial evils described above to top any "clear and present danger" component which this Court may choose to engraft onto the *Pickering* balancing approach in favor of sustaining the challenged statute. At a minimum, given the facial invalidation remedy which the Gay Task Force has elected to pursue, this Court should not conclude the absence of the requisite probability of evil as a matter of law.

In concluding the standard-of-review issue, it may also be observed that the application of a *Tinker* gloss to the *Pickering* balancing formula by the Tenth Circuit majority is inappropriate since that case dealt with student, not teacher, speech.

5. The interests of teachers in advocating, soliciting, imposing, encouraging, or promoting criminal homosexual sodomy in a manner likely to come to the attention of students or co-workers are outweighed by State interests found cognizable by this Court.

As a general matter, this Court has extended a higher level of First Amendment protection to speech concerning broad public interests as opposed to speech dealing with matters of more narrow or primarily private concern. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Roth v. United States*, 354 U.S. 476, 484 (1955); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In *Pickering*, this Court again noted that "free and unhindered debate on matters of public importance [constitutes] the core value of the Free Speech Clause of the First Amendment . . ." 391 U.S. 563, 573 (1968). More recently, Justice White, writing for this Court in *Connick v. Myers*, 461 U.S. 138 (1983) [hereinafter *Connick*], interpreted the above-described premise as follows:

Pickering, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, governmental officials should enjoy wide latitude in managing their officers, without intrusive oversight by the judiciary in the name of the First Amendment . . . Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. *Id.* at 146-148.

Several observations concerning the application of this standard by the Tenth Circuit majority may be made at this point. That court apparently concluded that since, in its interpretation of the statute, teacher testimony before the Oklahoma Legislature concerning the propriety of decriminalizing homosexual sodomy was proscribed by the Teacher Fitness Statute, that statute could conceivably be applied to speech of legitimate public interest and concern. As has been indicated, however, the Oklahoma Supreme Court, in *Gay Activists Alliance v. Board of Regents of the University of Oklahoma*, 638 P.2d 1116 (Okla. 1981), has recognized that peaceable advocacy of the repeal of criminal statutes enjoys protection by the First Amendment. *Id.* at 1122. Moreover, as has been established in Proposition I-A, *supra*, the statute, by its plain meaning, proscribes no more than advocacy, solicitation, imposition, encouragement, or promotion of criminal homosexual sodomy "in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees," 70 Okla. Stat. §6-103.15 (A)(2), and based further on consideration of the statute's four nexus requirements described above. The speech proscribed by the statute is very narrow. The Board of Education respectfully submits that advocacy of the commission of criminal homosexual sodomy is not a matter of legitimate public concern, and does not rise to the level of "core political speech" as that phrase has been defined by this Court. As stated by Judge Barrett, dissenting from the Tenth Circuit majority's opinion below, "[p]olitical expression and association is at the very heart of the First Amendment. The advocacy of a practice as universally condemned as the crime of sodomy hardly qualifies as such." 729 F.2d

1270, 1277 (10th Cir. 1984). (Jurisdictional Statement, Appendix, 11a.) Since such speech furthers no important political or social community interest, it should be afforded little — if any — First Amendment protection, even if uttered by a member of the citizenry as a whole.

The statute challenged by the Gay Task Force does not, however, proscribe such speech to members of the citizenry as a whole. Since only teachers come within its ambit, an appropriate First Amendment review must examine the relative weights of the individual and state interests involved. Having established that the social utility of the proscribed utterance is *de minimis* at most, the operation of the balancing test now requires a weighing of the countervailing state interests found cognizable by this Court in *Pickering*. As has been indicated, these factors include the interest in occupational effectiveness, as broadly defined by the purposes of public education; the interest in employee discipline; the interest in co-worker harmony; and the interest in co-worker personal loyalty and confidence.

Teacher advocacy of criminal homosexual sodomy may impair the achievement of these state interests in a number of ways. When it comes to the attention of students, given the significant "role model" function which teachers are called upon to perform, it is likely to engender disrespect for law as an institution, the social responsibilities of citizenship, and the political governmental process as a whole. This is true, of course, even if imminent lawless action is not produced. When it comes to the attention of other teachers or co-workers, it is likely to produce sufficient controversy, suspicion, and mistrust so as to threaten employee discipline, co-worker harmony, and that personal

loyalty and confidence requisite to particularly close employee relationships.

In analyzing specific factual situations pursuant to the *Pickering* balancing approach, trial courts have performed detailed analyses as to other factors not specifically enumerated in *Pickering's* general guidelines, including

- (1) likelihood of recurrence of the questioned conduct;
- (2) extenuating or aggravating circumstances; (3) effect of notoriety and publicity; (4) impairment of teacher-student relationships; (5) disruption of the educational process; (6) motive; and (7) proximity or remoteness in time of the conduct. *San Dieguito Union High School District v. Commission on Professional Competence*, 185 Cal. Rptr. 203, 205 (1952).

Other cases in which courts have judicially reviewed teacher unfitness determinations are replete with similar factor-analyses. See, e.g., *Morrison v. State Board of Education*, 461 P.2d 375, 386 (Cal. 1969); *Coupeville School District No. 204 v. Vivian*, 677 P.2d 192, 196-197 (Wash. App. 1984). It is interesting to note that, far from sweeping away free speech rights in unnecessarily broad language, the challenged Teacher Fitness Statute, in its nexus requirements set forth above, tracks, virtually verbatim, the guidelines which have been applied time and time again by trial courts, and approved without deviation on appeal. It is also interesting to note that Judge Eubanks, in upholding the challenged statute at the District Court level, noted this fact, and considered (insofar as is possible when a statute is facially challenged) whether the conduct proscribed by that statute was likely to lead to disruption of the educational process. Jurisdictional Statement Appendix, at 6b-7b. Finally, it is interesting to note that no such analysis

may be found in the opinion of the Tenth Circuit majority, which asserted, ignoring both Judge Eubanks' opinion and the facial nature of the challenge, that the Board of Education "has made no such showing [of disruption of official functions or impairment of teacher performance]." 729 F.2d 1270, 1274 (10th Cir. 1984); Jurisdictional Statement, Appendix, at 7a.

II. THE TENTH CIRCUIT COMMITTED REVERSIBLE ERROR BY APPLYING THE REMEDY OF FACIAL INVALIDATION TO THE CHALLENGED TEACHER FITNESS STATUTE.

A. Since the Statute Proscribes no Speech Which Is Constitutionally Protected to Public School Teachers, There Is no Overbreadth Whatsoever Present in Its Sweep.

The challenged statute was carefully drafted and is narrowly drawn. As has been maintained in Proposition I-A *supra*, its plain meaning, when the nexus requirements are properly considered, indicates that it sweeps no more broadly than is necessary to insure that the broad purposes of public education, including not only learning, but also student respect for law and public morality, and student social development, are protected. These public goals have long been endorsed by this Court.

Given the necessarily broad guidelines established for public school teacher speech by this Court in *Pickering*, *supra*, 391 U.S. 563, 569-573 (1968), it is difficult to imagine how nexus requirements might be drafted more narrowly while still ensuring the interests which the state has a right — if not a duty — to promote. The Board of Educa-

tion therefore respectfully submits that, given future reasonable applications of the challenged statute when courts and hearing officers are presented with actual facts — an assumption there is no reason to doubt — the statute is not overbroad at all, and should be facially sustained, on the merits, by this Court.

B. Alternatively, If Any Overbreadth Is Present in the Statute, It Is Not "Substantial" as That Term Has Been Defined by this Court.

Since the remedy of facial invalidation constitutes an exception to "two cardinal principles of our constitutional order — the personal nature of constitutional rights . . . and prudential limits on constitutional adjudication", *New York v. Ferber*, 458 U.S. 747, 767 (1982) [hereinafter *Ferber*], this Court has directed that it be employed "sparingly and only as a last resort", *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) [hereinafter *Broadrick*], and only in those situations in which no limiting construction of the challenged statute is available. *Id.* The Board of Education strongly urges, of course, that such a limiting construction — if necessary — is readily available. See Proposition I-A *supra*.

While this Court has required the lower courts, in cases where facial invalidation is sought, to proceed with "caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program," *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1974), the Tenth Circuit majority did not so proceed. While noting the existence of the statute's nexus requirements, it dismissed them with the observations that they did not satisfy the *Brandenburg* test, that "many adverse effects are not ma-

terial and substantial disruptions" (referring to the inapposite *Tinker* test), that the nexus requirements were not weighted by the statute, and that "[a]n adverse effect is apparently not even a prerequisite to a finding of unfitness." 729 F.2d 1270, 1275 (10th Cir. 1984); Jurisdictional Statement, Appendix, 7a-8a. Since the inadequacy of this analysis pursuant to the approach established by *Pickering v. Board of Education*, 391 U.S. 563 (1968), and other cases has been dealt with extensively *supra*, it need only be noted here that this analysis does not evidence the requisite "caution and restraint" by the Tenth Circuit majority in facially invalidating the challenged statute.

Nor did the Tenth Circuit majority explore the availability of any "limiting construction", which it was required to do pursuant to the overbreadth approach established by this Court in *Broadrick*, *supra*, 413 U.S. 601, 613 (1973), holding instead that "[i]t is not within this Court's power to construe and narrow state statutes." 729 F.2d 1270, 1275 (10th Cir. 1984); Jurisdictional Statement, Appendix, 8a.

Concomitant to the overbreadth policies and principles described above, this Court went on to hold in *Broadrick*, *supra*, that

particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

413 U.S. 601, 615 (1973).

As this Court observed in *Ferber*, *supra*, "the [*Broadrick*] requirement of substantial overbreadth extended 'at the very least' to cases involving conduct plus speech".

458 U.S. 747, 771 (1982), noting further that, "on most occasions involving facial invalidation, the Court has stressed the embracing sweep of the statute over protected expression". *Id.* (emphasis added). The "conduct plus speech" limitation on the substantial overbreadth doctrine — if, in fact, it was ever intended to be a limitation at all — was removed by this Court's observation in *Ferber* that

[t]he requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation. This observation appears equally applicable to the publication of books and films as it is to activities, such as picketing or participation in election campaigns, which have previously been categorized as involving conduct plus speech.

Id., 772 (Citation omitted). This Court also cited with approval therein a foundational justification for applying a "substantial overbreadth" limitation in all First Amendment cases:

"A substantial overbreadth rule is implicit in the chilling effect rationale. . . . [T]he presumption must be that only substantially overbroad laws set up the kind and degree of chill that is judicially cognizable." Moreover, "[w]ithout a substantial overbreadth limitation, review for overbreadth would be draconian indeed. It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application." Note, 83 Harv. L. Rev., *supra* n. 25, at 859, and n. 61.

Ferber, supra, 458 U.S. 747, 772 n. 27 (1984); see generally M. NIMMER, *Nimmer On Freedom of Speech* 4-153, 4-154 (1984). Even assuming *arguendo* any continued viability of the "speech plus conduct" approach, "soliciting" or "imposing" criminal homosexual sodomy, proscribed by the challenged statute, 70 Okla. Stat. Sec. 6-103.15(A)(2), and also held facially unconstitutional by the Tenth Circuit majority, should satisfy any such requirement.

Case-by-case analysis, of course, better serves the interests of justice than facial overbreadth invalidation where only insubstantial hypothetical overbreadth exists. See *Broadrick, supra*, 413 U.S. 601, 615-616 (1973); *Ferber, supra*, 458 U.S. 747, 774 (1982). As expressed by Justice Stevens, concurring in the judgment in *Ferber*,

[w]hen we follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication.

Ferber, supra, 458 U.S. 747, 780-781 (1982) (Stevens, J., concurring in the judgment).

This observation, true generally, is especially apposite in the governmental employment context, where no criminal penalties may be imposed. As Judge Leventhal observed in *Waters v. Peterson*, 495 F.2d 91 (D.C. Cir. 1973),

[w]hile the problem of overbreadth in the public employment sphere can raise First Amendment questions, . . . it does not necessarily require the same remedy as overbreadth in the criminal statutes; specifically, it does

not require either a prohibition of any and all penalties, or striking down the regulation, since in matters pertaining to "efficiency of the service" it may be impossible to avoid a broadly-worded regulation. Deterrence of legitimate speech must be minimized by proper application of the prohibition to activity not protected by the First Amendment.

Id., 99. (Emphasis added). In *Ferber, supra*, this Court also recognized that the penalty to be imposed is relevant in determining whether even demonstrable overbreadth is substantial. 458 U.S. 747, 773 (1982). The Board of Education respectfully submits that the *nexus* requirements contained in the challenged statute approach their subject with as great a specificity as can reasonably be required, and that the non-criminal nature of the statutory penalties be considered when determining the rigor with which the strong medicine of facial overbreadth should be applied.

In sum, the statutory proscriptions against the indiscreet solicitation or imposition of criminal homosexual sodomy by public school teachers were stricken by the Tenth Circuit majority along with the rest, and the rest should be controlled by *Pickering*, not *Brandenburg*. Clearly, the challenged Teacher Fitness Statute is one which, if overbroad at all, has a legitimate reach which "dwarfs its arguable impermissible applications". *Ferber, supra*, 458 U.S. 747, 773 (1982). It should not be facially invalidated based on marginal, hypothetical applications of the law.

CONCLUSION

The Tenth Circuit majority below, having interpreted the challenged statute in a manner inconsistent with its plain meaning and virtually inescapable implications, then proceeded to test it by an incorrect standard of First Amendment review. Having committed these two fundamental errors, the commission of its third error was inevitable: it voided the statute as facially overbroad. The Board of Education respectfully submits that the interests of justice and judicial economy are best served by reversal of the Circuit opinion below.

Respectfully submitted,

Larry Lewis
Counsel of Record
Suite 410
4001 N. Lincoln
Oklahoma City, Oklahoma 73105

James B. Croy
P. O. Box 10798
Midwest City, Oklahoma 73140

Dennis W. Arrow
Oklahoma City University
Law School
2501 N Blackwelder
Oklahoma City, Oklahoma 73106

Attorneys for Appellant

November, 1984

Office - Supreme Court, U.S.
FILED
NOV 15 1984

Nos. 83-2030

STEVAS
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THE BOARD OF EDUCATION OF THE CITY OF
OKLAHOMA CITY, STATE OF OKLAHOMA,
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

**BRIEF AMICUS CURIAE
IN SUPPORT OF APPELLANTS**

CONCERNED WOMEN FOR AMERICA
EDUCATION AND LEGAL DEFENSE
FOUNDATION

Michael P. Farris
Jordan W. Lorence
Legal Counsel

Office and Post Office Address:
122 C Street, N.W., Suite 800
Washington, D.C. 20001
(202) 628-3014

QUESTIONS DISCUSSED

Did the Tenth Circuit use the correct standard to judge the free speech rights of public school teachers?

Did the Tenth Circuit properly construe 70 Oklahoma Statute 6-103.15?

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
I. THE TENTH CIRCUIT USED THE WRONG STANDARD	1
II. THE TENTH CIRCUIT MISCONSTRUED THE STATUTE IN QUESTION	2

TABLE OF AUTHORITIES

Cases:

<i>Abington School District v. Schempp</i> , 374 U.S. 203, 83 L.Ed.2d 1560, 10 L.Ed.2d 844 (1963)	6
<i>Acanafora v. Bd. of Ed. of Montgomery County</i> , 359 F.Supp. 843 (D. Md. 1973)	17, 18
<i>Ambach v. Norwick</i> , 441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979)	8
<i>Brandenburg v. Ohio</i> , 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969)	passim
<i>Broadrick v. Oklahoma</i> 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed. 2d 830 (1973)	11
<i>Concordia Insurance Co. v. School District</i> , 282 U.S. 545, 51 S.Ct. 275, 75 L.Ed. 528 (1931)	12
<i>Connick v. Myers</i> , ___ U.S. ___, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)	6, 7
<i>Erznoznik v. City of Jacksonville</i> , 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975)	10

Page

<i>Gaylord v. Tacoma School District No. 10</i> , 88 Wash.2d 286, 559 P.2d 1340 (1977)	19
<i>Grayned v. City of Rockford</i> , 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)	11
<i>McConnell v. Anderson</i> , 451 F.2d 193 (8th Cir. 1971)	18
<i>Morrison v. State Bd. of Ed.</i> , 1 Cal.App.3d 214, 82 Cal. Rptr. 175, 461 P.2d 375 (1969)	16
<i>Moser v. State Bd. of Ed.</i> , 22 Cal.App.3d 988, 101 Cal.Rptr. 86 (1972)	16
<i>National Gay Task Force v. Bd. of Ed.</i> , 727 F.2d 1270 (10th Cir. 1984).....	<i>passim</i>
<i>New York v. Ferber</i> , 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982)	10, 12
<i>Palmer v. Bd. of Ed. of the City of Chicago</i> , 466 F.Supp. 600 (N.D. Ill. S.D. 1979)	8, 9
<i>Pickering v. Bd. of Ed.</i> , 391, U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)	<i>passim</i>
<i>Sheldon v. Tucker</i> , 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960)	8
<i>Tinker v. Des Moines Independent School District</i> , 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) .	7, 15, 17, 18, 19
<i>Widmar v. Vincent</i> , 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981)	10
Statutes:	
70 Oklahoma Statute §6-103.15	1, 13

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

Nos. 83-2030

THE BOARD OF EDUCATION OF THE CITY OF
OKLAHOMA CITY, STATE OF OKLAHOMA,
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

**BRIEF AMICUS CURIAE
IN SUPPORT OF APPELLANTS**

I

**THE TENTH CIRCUIT FAILED TO FOLLOW
THIS COURT'S DECISIONS CONCERNING
FREE SPEECH RIGHTS OF PUBLIC SCHOOL
TEACHERS**

The Tenth Circuit declared unconstitutional a portion of 70 Okla. Stat. §6-103.15, the law that allows public school teachers to be fired for engaging in "public homosexual conduct," which is defined in the statute as, "advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees." *Na-*

tional Gay Task Force v. Board of Education, 727 F.2d 1270 (10th Cir. 1984.) The statute then gives four standards by which to judge whether the teacher's behavior renders the teacher unfit for teaching children in public schools.

The Tenth Circuit invalidated this section of the law by relying on the standards spelled out in *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). We would submit that the Tenth Circuit's reliance on *Brandenburg* is misplaced. The case which should have controlled their decision is *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Although the Tenth Circuit referred to *Pickering*, their analysis of the Oklahoma statute was made with little regard to the principles of *Pickering*, and with almost total reliance on the "imminent lawless action" test of *Brandenburg*.

The Tenth Circuit said:

The First Amendment protects 'advocacy' even of illegal conduct except when 'advocacy' is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action, *Brandenburg*, (citation omitted). The First Amendment does not permit someone to be punished for advocating illegal conduct at some indefinite future time, *Hess v. Indiana*, 414 U.S. 105, 109, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973)."
—729 F.2d at 1274.

The court of appeals noted the *Pickering* holding that the State has an interest in maintaining the efficiency of the educational process in public schools and therefore may in some ways limit the speech of public school teachers. The court noted:

We recognize that a state has interests in regulating the speech of teachers that differ from its interests in regulating the speech of the general citizenry, *Pickering v. Bd. of Ed.*, (citation omitted). But a state's interests outweigh a teacher's interests only when the expression results in a material or substantial interference or disruption in the normal activities of the school. See *Tinker v. Des Moines Independent Community School District*, (citation omitted). This Court has held that a teacher's First Amendment rights may be restricted only if "the employer shows that some restriction is necessary to prevent the disruption of official functions or to insure effective performance by the employee." *Childers v. Independent School District No. 1*, 676 F.2d 1338, 1341 (10th Cir. 1982). Defendant has made no such showing.

—729 F.2d at 1274

However, as we have noted, the Tenth Circuit's analysis of the Oklahoma statute gave little regard to *Pickering*, but placed almost total reliance on the "imminent lawless action" test of *Brandenburg*.

We would suggest that *Pickering* is the more relevant precedent to follow in this case for three principal reasons. First, *Pickering* involves the analysis of the free speech rights of teachers in their capacity as public employees, while *Brandenburg* involves the rights of the general public to freedom of speech. Second, in *Pickering* the party asserting free speech rights faced the potential loss of employment, while in *Brandenburg* the consequences were criminal prosecution for speech with the possibility of jail time. Third, in *Pickering* the teacher was dealing with the school system which, of course, deals with

children. In *Brandenburg* the speech was directed toward members of the general public.

Brandenburg concerned a group of Ku Klux Klan members who had met and advocated violence against blacks and other minority groups. The Klansmen had been charged with violating Ohio's criminal syndicalism statute. On the facts, *Pickering* parallels more closely the case at hand than does *Brandenburg*. Most importantly for this case, *Pickering* uses a different constitutional test than the one used in *Brandenburg*.

In *Pickering*, a public school teacher from Illinois was fired because he wrote a letter to the editor, that was published. The letter to the editor criticized the way the board of education and the school superintendent had handled past proposals to raise new revenue for the school system. The school board then acted to fire the teacher for writing this letter. The Supreme Court reversed the firing, saying that it violated the teacher's right to freedom of speech. In *Pickering*, the Supreme Court laid out the standards that limit a teacher's freedom of speech because of his employment as a public employee:

The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern, and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

-391 U.S. at 568.

This Court said that a "balancing test" is the appropriate standard to use when examining the free speech rights of public school teachers, because the State has an interest in "promoting the efficiency of the public services it performs through its employees."

Pickering and not *Brandenburg* should control this Court's analysis of the Oklahoma law. The Tenth Circuit failed to note the factual similarities between *Pickering* and the case at hand, and the significant factual differences between *Brandenburg* and the case at hand.

First, the Oklahoma law deals with public school teachers, whom the government employs, so there is a legitimate government interest in the teacher's behavior, *Pickering*. The government has no interest in the views or behavior of Ku Klux Klan members, as in *Brandenburg*, unless they break the law. Klansmen are private citizens; teachers are employees of the state.

Also, the consequences to the individuals involved are different. A teacher who violates the Oklahoma law would lose his job. A Klansman (or anyone else) who violated the Ohio criminal syndicalism law would be convicted of a crime.

Of course, this Court should guard vigilantly against any impingement of free speech involving private citizens being subjected to criminal prosecution. But, when considering the free speech rights of public school teachers, this Court has said in *Pickering* that their interests must be balanced with the interests of the State in maintaining an efficiently run education system.

This means, this Court has said in essence, that the State may place limited restrictions on the speech of public school teachers. This conclusion is apparent from two lines of decisions by this Court that point to two countervailing interests that allow some restrictions on the speech of teachers: 1. Public school teachers are employed by the State, and 2. Children receive special protections which allow restrictions on the speech of others.

A.

Limits on Teachers' Speech Because They are Public Employees

Pickering and not *Brandenburg* applies to public school teachers, because public school teachers are employed by the State, and are therefore representatives of the State. This Court said in *Pickering* that a public employee has limitations placed on his free speech rights that could not be placed on others in the United States, because the public school teacher works for the state.

For example, an evangelist has the constitutional right to stand on a soapbox in a public city park and preach the Christian gospel to passersby, but a public school teacher does not have the right to preach the Christian gospel to his students in the classroom. Because the public school teacher is an agent of the state, he must have some limits on his speech, or else he will disrupt the educational process, or teach things that are unconstitutional for the state to teach, such as religion. This restricts the teacher's speech based on the content of the speech, but countervailing constitutional interests make such a restriction constitutionally acceptable. See *Abington School District v. Schempp*, 374 U.S. 203, 83 L.Ed. 2d 1560, 10 L.Ed.2d 884 (1963).

The fact that the Supreme Court has intended for the *Pickering* "balancing test" to be used in a public school teacher context, and not a *Brandenburg* "imminent, lawless action" test, is apparent from several other decisions. In the recent case of *Connick v. Myers*, ___ U.S. ___, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), the Court said:

We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon mat-

ters only of personal interests, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

—75 L.Ed at 720.

This Court further held in *Connick*:

Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.

—*Id.*

This Court is not saying that the free speech rights of teachers dangle totally at the whim of the public employer. The Court is saying that if an employee speaks as an employee on personal matters, his speech is not necessarily protected, because it may be disruptive to the work place.

This Court expressed this principle in another case, saying that school officials may limit the free speech rights of students and teachers, if their speech may "materially and substantially interfere with the requirement of appropriate discipline in the operation of the school," *Tinker v. Des Moines Community School District*, 393 U.S. 503, 509, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

The Tenth Circuit cited both *Tinker* and *Pickering*, but the test they end up using is the test of *Brandenburg*. The Tenth Circuit simply did not give sufficient weight to the State's interest in maintaining the efficiency of the educational process offered in its schools.

Classroom disruption is not the only issue when a teacher stands as the representative of the state before the students in a public school classroom. The state has the power to teach shared community values, and the state is

forbidden to teach other values, such as ones that promote religion. In *Sheldon v. Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960), the Supreme Court said:

The State can investigate the "competence and fitness" of public school teachers because "a teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live." [quoting *Adler v. Bd. of Ed.*, 342 U.S. 485, 493, 72 S.Ct. 380, 96 L.Ed. 517 (1952).] There is "no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors." [quoting *Beilan v. Bd. of Ed.*, 357 U.S. 399, 406, 78 S.Ct. 1317, 2 L.Ed.2d 1414, 1420 (1958)].

—364 U.S. at 484.

In *Ambach v. Norwick*, 441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed. 2d 49 (1979), the Supreme Court said:

A State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subjects taught. Certainly a State may take account of a teacher's function as an example for students, which exists independently of particular classroom subjects.

—441 U.S. at 80.

In the lower court decision of *Palmer v. Board of Ed. of the City of Chicago*, 466 F.Supp. 600 (N.D. Ill. S.D. 1979), the federal court said along these same lines:

Further, the court recognizes the defendant school board has an "undoubted right" to regulate its curriculum *Epperson v. Arkansas*, 393 U.S. 97, 107, 89 S.Ct. 266, 21 L.Ed.2d 228

(1968). States acting through local school boards are possessed of power "to inculcate basic community values in students who may not be mature enough to deal with academic freedom as understood or practiced at higher education levels" *East Hartford Ed. Assn. v. Bd. of Ed.*, 562 F.2d 838, 843 (2nd Cir. 1977).

—466 F.Supp. at 602-3.

In *Palmer* the school board fired a teacher who was a Jehovah Witness, who refused to lead her students in a flag salute and the Pledge of Allegiance, and would not teach about certain areas of American history. The school board was required by Illinois law to make sure that the teachers taught "patriotism" to the public school students. The teacher was fired, and the courts upheld the firing because her personal beliefs prevented her from teaching the public values mandated by law.

Oklahoma law also places similar restrictions on public school teachers' right to free speech. The statute, 70 Okla. Stat. §6-103, allows teachers to be fired for "immorality, willful neglect of duty, cruelty, incompetency, teaching disloyalty to the American Constitutional system of government, or any reason involving moral turpitude. . . ."

This demonstrates clearly that the courts have allowed some restrictions on the free speech rights of teachers because they are public employees.

B.**Limits on Public School Teachers' Speech
Because They Deal with Children**

The Supreme Court has granted special protections to children, because they are young, vulnerable and impressionable. These protections for children also act to limit the free speech rights of others.

In *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975), the Supreme Court expressed the need to protect children:

It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults. See *Ginsberg v. N.Y.*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968).

—422 U.S. at 212.

See also *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

This Court implied that speech could be restricted in elementary and secondary public schools in a way that would be prohibited in colleges and universities. In *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), this Court said in footnote 14:

University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.

—454 U.S. at 274.

The Tenth Circuit did not take these interests into account, and therefore, analyzed the Oklahoma law incorrectly, by using the "imminent lawless action" standard of

Brandenburg, rather than the balancing test of *Pickering*. The courts have allowed restrictions on a teacher's right to free speech in the past because public school teachers stand as the representative of the state, and they deal with children.

II**THE TENTH CIRCUIT'S CONSTRUCTION OF
THE OKLAHOMA STATUTE IS STRAINED
BEYOND ITS INTENT — PROPERLY CONSTRUED
IT IS CLEARLY CONSTITUTIONAL**

The Supreme Court has made this statement about facial attacks of overbreadth on statutes affecting speech:

Application of the overbreadth doctrine in this manner, is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.

—*Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

The Tenth Circuit in this case, in effect argues that it had no choice but to find the Oklahoma statute unconstitutionally overbroad on its face. The court said:

A statute is saved from a challenge to its overbreadth only if it is "readily subject" to a narrowing construction. It is not within this Court's power to construe and narrow state statutes. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

—729 F.2d at 1275.

We would submit that the Tenth Circuit misreads both *Grayned* and the Oklahoma statute. *Grayned* does not stand for the proposition that federal courts are without

power to construe state statutes. The authority of the federal courts to make such constructions is well established. See e.g., *Concordia Insurance Co. v. School District*, 282 U.S. 545, 51 S.Ct. 275, 75 L.Ed. 528 (1931). See also, *New York v. Ferber*, *supra*, 458 U.S. at 767.

Grayned stands for the principle that federal courts cannot make strained interpretations of state statutes in order to save their constitutionality.

We would respectfully suggest that the reverse is also true. Federal courts should not make strained interpretations of state statutes to reach a finding of unconstitutional overbreadth. This is precisely what the Tenth Circuit has done.

The Tenth Circuit said:

"Encouraging" and "promoting," like "advocating," do not necessarily imply incitement to imminent action. A teacher who went before the Oklahoma legislature or appeared on television to urge the repeal of the Oklahoma anti-sodomy statute would be "advocating," "promoting," and "encouraging," homosexual sodomy and creating a substantial risk that his or her speech would come to the attention of school children or school employees if he or she said, "I think it is psychologically damaging for people with homosexual desires to suppress those desires. They should act on those desires and should be legally free to do so." Such statements, which are aimed at legal and social change, are at the core of First Amendment protections.

— 729 F.2d at 1274.

The Tenth Circuit cites no legislative history, no actual examples, nor makes any logical analysis of the language

of the statute to reach its conclusion that the mere advocacy of a change in the law would *ipso facto* give rise to a teacher's dismissal. We would respectfully suggest that such examples are strained and are not mandated by the language of the statute.

When a person works in the legislative arena advocating a change in the law it cannot be said that the person is advocating that people engage in the activity which is the subject of the law. Legislators or lobbyists who advocate a change in the age of consent for the purposes of statutory rape are not necessarily advocating that people actually engage in sex with those who would fall outside the protection of the new law. People who advocate a change in the marijuana laws could do so because it has become so pervasive that it presents law enforcement difficulties. They are not necessarily advocating that people smoke marijuana.

In the same way, teachers in Oklahoma who advocate a change in the sodomy laws are not necessarily advocating that people engage in homosexuality. Rather, they are advocating legal change, not sexual behavior. It is beyond question that the statute is aimed at teachers who directly advocate that homosexual sexual behavior should be practiced.

The Tenth Circuit goes out of its way to make a limiting construction upon the statutory "factors [to] be considered in making the determination whether the teacher . . . has been rendered unfit for his position." Okla. Stat. tit. 70, § 6-103.15 (C). The court said:

The statute declares that a teacher may be fired under § 6-103.15 only if there is a finding of "unfitness" and lists factors that are to be considered in determining "unfitness": whether the activity

or conduct is likely to adversely affect students or school employees; whether the activity or conduct is close in time or place to the teacher's student teacher's or teachers aide's official duties; whether any extenuating or aggravating circumstances exist; and whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity. An adverse effect on students or other employees is the *only factor* among those listed in § 103.15 that is even related to a material and substantial disruption. [Emphasis added.]

—729 F.2d at 1274-75.

This statutory construction is strained indeed to assert that "an adverse effect on students or other employees is the only factor . . . that is even related to a material and substantial disruption." If the teacher has engaged in advocacy of homosexual behavior ten years previously with no intervening incidents and in another area of the state, it is highly unlikely that such behavior would come to the attention of students. Accordingly, the criteria requiring consideration of the proximity of time and place to the teacher's official duties is indeed very important in reaching a determination of whether there has been a material and substantial disruption of the educational atmosphere.

Likewise the continuing nature of the conduct also can play an important role in evaluating the impact that a teacher's statements would have upon his students. Frequent statements are much more likely to create a material and substantial disruption in the school environment than an occasional or one-time statement.

Without any justification from the language of the

statute, the statutory history, or the clear legislative intent the Tenth Circuit has engaged in speculative interpretation of this law to reach its desired result in striking the statute for overbreadth.

In essence, this law only prohibits teachers from advocating violation of Oklahoma's criminal sodomy law. As the district court pointed out, this law does not allow teachers to be fired in the following circumstances:

- a. a heterosexual or homosexual teacher who merely advocates equality for or tolerance of homosexuality;
- b. a teacher who openly discusses homosexuality;
- c. a teacher who assigns for class discussion study articles and books written by advocates of gay rights;
- d. a teacher who expresses an opinion, publicly or privately on the subject of homosexuality;
- e. a teacher who advocates the enactment of laws establishing civil rights for homosexuals. Appendix, Appellant's Jurisdictional Statement, Appendix 21b.

Also, it would seem that on its face, the law would not prohibit teachers from advocating repeal of Oklahoma's criminal sodomy statute. The law allows teachers to be fired for advocating that people break Oklahoma's criminal sodomy law.

We would respectfully suggest that the district court's reading of the statute was much more reasonable in its construction, and consistent with standards expressed in *Pickering*.

The Tenth Circuit's one-dimensional analysis fails to take into account the *Pickering* values, that a school may fire a teacher if the teacher's speech "materially and substantially" affects the operation of the school. (see *Tinker, supra*). The question put specifically, is, can advocacy of

criminal sodomy or homosexuality by a teacher disrupt the educational process of a classroom?

Several lower courts have upheld the decision of school districts to fire or transfer teachers out of the classroom, because they are homosexuals, and their homosexuality affected the efficiency of the educational process in the school.

One of the cases involved a teacher who was dismissed because he performed illegal homosexual acts in a restroom, *Moser v. State Bd. of Ed.*, 22 Cal.App.3d 988, 101 Cal.Rptr. 86 (1972). Both the trial court and the Tenth Circuit agreed that a teacher could be fired for violation of criminal laws against homosexuality.

In another California case, the California Supreme Court said a male teacher could not lose his teaching credentials for engaging in a "limited, noncriminal physical relationship" with another man for a period of one week, *Morrison v. State Bd. of Ed.*, 1 Cal.App.3d 214, 82 Cal.Rptr. 175, 461 P.2d 375 (1969). In footnote 4, 82 Cal. Rptr. at 177, of the opinion, the court said if the teacher had been convicted of criminal sodomy, or any other illegal homosexual activity, the State Board of Education would be required to revoke his teaching credentials.

Therefore, these two California cases agree with the Tenth Circuit, when it upheld the portion of the Oklahoma law that allows teachers to be fired for engaging in criminal sodomy:

We see no constitutional problems in the statute's permitting a teacher to be fired for engaging in "public homosexual activity."

—729 F.2d at 1273.

This is stating the obvious principle, that a teacher may be fired for breaking a criminal law, especially one involving moral turpitude, even though many people believe sodomy should not be against the law.

What of the homosexual teacher who is not convicted of criminal sodomy? Should he be fired merely for being a homosexual?

Three other cases allowed schools to fire or transfer teachers, not simply because they were homosexuals, but because they publicly revealed it, and it then became a disruptive element in the classroom. These three lower court decisions essentially agree with the language of the Oklahoma law, and *Pickering* and *Tinker*. A teacher can be fired if his homosexuality disrupts the classroom.

In *Acanafora v. Bd. of Ed. of Montgomery County*, 359 F.Supp. 843 (D. Md.1973) cert. den., 419 U.S. 836 (1974), the federal district court upheld the transfer of a homosexual teacher to a non-classroom setting, because he repeatedly went public in the media about his homosexuality and his problems with the school district. The court said:

The question becomes whether the speech is likely to incite or produce imminent effects deleterious to the educational process. Such speech is not within the bounds of the "protectable," and the Board of Education is not precluded from taking reasonable action with respect to it.

—359 F.Supp. at 856.

The Court said that instructing children is a special job, and that it places restrictions on a teacher's free speech rights. For example, the court said, a teacher could not discuss his sex life in front of the class.

The court in *Acanafora* upheld the transfer out of the classroom of the homosexual teacher for several reasons. The court said the Task Force of the National Institute of Mental Health had said that "prevention of homosexuality is a desirable goal." The court said the school board could remove the teacher from the classroom because

1. There is a cultural stigma against homosexuality
2. The notoriety of this specific case disrupts the educational process (the teacher had appeared on CBS's *60 Minutes*, and other television shows).
3. Experts disagree whether a homosexual teacher can act as a "passive role model" to influence young children to turn to homosexuality.

Collectively, the court said, these reasons are sufficient to transfer the teacher, because they are not "undifferentiated apprehension or fear of disturbance (quoting *Tinker*)." 359 F. Supp. at 855-856. It would seem from reading the opinion that the court was persuaded by the fact of the publicity this case had received. Again, the Oklahoma law requires this to be taken into consideration before any teacher is declared unfit to teach.

In *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971) the Eighth Circuit Court of Appeals upheld the action by the University of Minnesota Board of Regents not to hire a homosexual man to work at the library on the St. Paul campus. The court explained that before he had applied for the job, the homosexual had applied for a marriage license in Minneapolis with another homosexual man, and this situation had been widely covered by the media, and was the impetus of a lawsuit challenging the Minnesota law that grants marriage licenses only to heterosexual adult couples. The court agreed with the University of

Minnesota that the publicity surrounding the man's homosexuality made him unfit for employment:

[This is] a case in which the applicant seeks employment on his own terms. . . the right to pursue an activist role in *implementing* his unconventional ideas concerning the societal status to be accorded homosexuals, and thereby, to foist tacit approval of this socially repugnant concept upon his employer, who is, in this instance, an institution of higher learning. [Emphasis in original.]

—451 F.2d at 196.

Again, the court used an analysis essentially the same as the one in *Pickering* and *Tinker*, and also used in the Oklahoma statute. The court balanced the interests and weighed the factors, and found that the applicant's public advocacy of homosexuality would be disruptive to the educational processes at the University of Minnesota.

In the third case, *Gaylord v. Tacoma School District No. 10*, 88 Wn. 2d 286, 559 P.2d 1340 (1977) cert. den. 434 U.S. 879 (1978), the Washington Supreme Court upheld the firing of a homosexual teacher who worked in a public high school.

In *Gaylord*, a public school teacher sought out homosexual friends, and told a student that he was a homosexual. The student told the school officials, who fired him for "immorality," partially due to the fact that Washington had a criminal sodomy law at that time. The teacher's behavior as a homosexual would have violated the criminal sodomy law, even though he had never been convicted under it. The Supreme Court of Washington spoke against blanket approval to fire homosexual teachers:

"Immorality" must not be construed in its abstract sense apart from its effect upon teaching efficiency or fitness to teach.

— 559 P.2d at 1343.

The Washington Supreme Court evaluated the facts in light of this standard, and ruled that the homosexual teacher had lost his effectiveness as a teacher, because he had been seeking out homosexual friends, and the publicity of his situation had disrupted the educational process in the classroom.

The Oklahoma law, similarly, does not offer a blanket power to school officials to fire homosexual teachers, simply because they are homosexuals. The teacher's homosexuality must disrupt the educational process in the ways spelled out in the law before it is proper to declare the teacher unfit to teach under that statute.

Therefore, the Oklahoma statute is not overbroad, but is drafted consistent with the standards spelled out in *Pickering*, and with appropriate safeguards to ensure that teachers are not fired for exercising protected speech. The statute can be construed in a manner that is constitutional, which is what the federal district court did. Therefore, this Court should reverse the portion of the Tenth Circuit's

opinion that found a portion of the Oklahoma law unconstitutionally overbroad, and reinstate the federal district court opinion.

Respectfully submitted,

CONCERNED WOMEN FOR AMERICA
EDUCATION AND LEGAL DEFENSE
FOUNDATION

By:
Michael P. Farris
General Legal Counsel

Jordan W. Lorence
Staff Attorney

Office and Post Office Address:
122 C Street, N.W., Suite 800
Washington, D.C. 20001
(202) 628-3014

November 12, 1984

IN THE
SUPREME COURT OF THE UNITED STATES

No. 83-2030

THE BOARD OF EDUCATION OF THE CITY OF
OKLAHOMA CITY, STATE OF OKLAHOMA,
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of Amicus Curiae in Support of Appellant has been served upon counsel by placing the same in the United States mail, postage prepaid, properly addressed this 15th day of November, 1984, to:

Lawrence Tribe
Harvard Law School
Griswold Bldg. #307
Cambridge, MA 02138

Leonard Graff
Donald Knutson
540 Castro St.
San Francisco, CA 94114

William Rogers
6440 Avondale Dr., Suite 200
Oklahoma City, OK 73116

Larry Lewis
4001 N. Lincoln
Suite 410
Oklahoma City, OK 73105

James Croy
P.O. Box 10798
Midwest City, OK 73140

Leland Selna, Jr.
Robert Goodman
2700 Russ Bldg.
235 Montgomery St.
San Francisco, CA 94104

Respectfully submitted,

Jordan W. Lorence
*Counsel for Concerned
Women for America*

NOV 15 1984

ALEXANDER L. STEVAS,
CLERK

No. 83-2030

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THE BOARD OF EDUCATION OF
THE CITY OF OKLAHOMA CITY,
STATE OF OKLAHOMA,

Appellant,

-vs.-

NATIONAL GAY TASK FORCE,

Appellee.

BRIEF OF THE STATE OF OKLAHOMA
AMICUS CURIAE IN SUPPORT
OF THE APPELLANT

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

DAVID W. LEE*
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL AND FEDERAL DIVISIONS

112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921
ATTORNEYS FOR APPELLANT

*Counsel of Record

TABLE OF CONTENTS

	<u>Page</u>
Interest of the Amicus	2
Summary of Argument	2
Proposition I	
HOMOSEXUALITY IS A CRIME IN THE STATE OF OKLAHOMA; THEREFORE, TO PERMIT PUBLIC SCHOOL TEACHERS TO ADVOCATE, ENCOURAGE OR PROMOTE HOMO- SEXUAL SODOMY WOULD BE TO ALLOW THE TEACHERS TO ADVOCATE, ENCOURAGE OR PROMOTE CRIMINAL BEHAVIOR.	4
Proposition II	
THE LANGUAGE OF THE STATUTE CLEARLY DICTATES THAT THE PROSCRIBED CONDUCT IS THE ADVOCATION, ENCOURAGEMENT OR PROMOTION OF ACTUAL HOMOSEXUAL SODOMY WHICH CARRIES A SUBSTANTIAL RISK OF DETRIMENTALLY AFFECTING THE STUDENT. NO POLITICAL OR SOCIETAL COMMENTARY ARE REGULATED BY THIS STATUTE.	11
Proposition III	
FOR THE PROTECTION OF ITS YOUTH IN THE CONTEXT OF THE PUBLIC SCHOOL SYSTEM, THE STATE MAY REGULATE OB- JECTIONABLE SPEECH WHICH COULD AD- VERSELY AFFECT THE WELL BEING OF THE CHILDREN OR CAUSE THE DISRUPTION OF THE EDUCATIONAL PROCESS.	15
Conclusion	24

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<u>Arnett v. Kennedy</u> , 416 U.S. 134 (1974)	20
<u>Bookcase, Inc. v. Broderick</u> , 18 N.Y. 2d 71, 271 N.Y.S.2d 947, 218 N.E.2d 668 (1966)	16
<u>Broadrick v. Oklahoma</u> , 413 U.S. 601 (1973)	19
<u>Brown v. Board of Education</u> , 347 U.S. 483 (1954)	8
<u>Carson v. State</u> , 529 P.2d 499 (Okl.Cr. 1974)	5
<u>Chaplinsky v. New Hampshire</u> , 315 U.S. 568 (1942)	23
<u>Clayton v. State</u> , <u>P.2d</u> , 55 O.B.A.J. 1786 (Sept. 7, 1984)	5
<u>Connick v. Meyers</u> , 461 U.S. 138 (1983)	19,23
<u>CSC v. Letter Carriers</u> , 413 U.S. 548 (1973)	19,20
<u>Feiner v. New York</u> , 340 U.S. 315 (1951)	23
<u>Ginsberg v. New York</u> , 390 U.S. 629 (1968)	15,16,17
<u>Goss v. Lopez</u> , 419 U.S. 565 (1975)	9

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Johnson v. State</u> , 380 P.2d 284 (Okl.Cr. 1963)	6
<u>People v. Kahan</u> , 15 N.Y.2d 311, 258 N.Y.S.2d 391, 206 N.E.2d 333 (1965)	17
<u>Pickening v. Board of Education</u> , 391 U.S. 563 (1968)	19
<u>Rose v. Locke</u> , 423 U.S. 48 (1975)	6
<u>Terminiello v. Chicago</u> , 337 U.S. 1 (1949)	23
<u>Wainwright v. State</u> , 414 U.S. 21 (1973)	6
<u>Warner v. State</u> , 489 P.2d 526 (Okl.Cr. 1971)	6

STATUTES

Okla. Stat. Ann. tit. 21, § 886 (West Supp.1984)	5,6
Okla. Stat. Ann. tit. 70, § 6-103.15 (West Supp.1984)	11,14,21,25

OTHER AUTHORITIES

1984 Book of Discipline of the
United Methodist Church

22

No. 83-2030

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THE BOARD OF EDUCATION OF
THE CITY OF OKLAHOMA CITY,
STATE OF OKLAHOMA,

Appellant,

-vs.-

NATIONAL GAY TASK FORCE,

Appellee.

BRIEF OF THE STATE OF OKLAHOMA
AMICUS CURIAE IN SUPPORT
OF THE APPELLANT

The State of Oklahoma by Michael C. Turpen, Attorney General, submits its amicus curiae, brief in support of the Appellant Oklahoma City Board of Education, in the above-entitled cause, pursuant to Sup.Ct.R. 36.4.

INTEREST OF THE AMICUS

The Attorney General has filed this amicus brief in support of the right of the legislature of the State of Oklahoma to enact statutes which allow the removal from the public school system of a teacher whose advocacy of homosexual conduct may impair the efficiency of the school system or undermine the relationship between teacher and student or cause dissention among the students themselves.

SUMMARY OF ARGUMENT

The legislature of Oklahoma has determined that a teacher who advocates homosexual conduct in a way that adversely affects students or school employees can be discharged for this reason. Oklahoma requests this Court to uphold its finding that the activities of such teachers can interfere with the proper

functioning of a school and can cause dissention among parents and students.

In Oklahoma it is a criminal act to engage in homosexual conduct. Therefore, a teacher who advocates such is advocating disobedience to the law. If Oklahoma can be required by the federal judiciary to retain such a teacher, it could not discharge other teachers who might advocate non-adherence to other laws, such as those against possession or distribution of narcotics.

A teacher occupies a special role in society. A teacher communicates to his or her students not only skills relating to classroom subjects, but by example demonstrates moral values as well. A state should be permitted to require that a public school teacher remain neutral with regard to public advocacy of issues which are controver-

sial and which may promote strife within a school system.

This Court has upheld the government's right to impose limitations upon political activities of their employees in the interest of maintaining confidence in government. The Court has also recognized the need to balance the interests of the employee as a citizen with those of the government in promoting efficiency and in dispelling disharmony.

PROPOSITION I

HOMOSEXUALITY IS A CRIME IN THE STATE OF OKLAHOMA; THEREFORE, TO PERMIT PUBLIC SCHOOL TEACHERS TO ADVOCATE, ENCOURAGE OR PROMOTE HOMOSEXUAL SODOMY WOULD BE TO ALLOW THE TEACHERS TO ADVOCATE, ENCOURAGE OR PROMOTE CRIMINAL BEHAVIOR.

The Constitution of the United States has reserved to the States the power to regulate the health, safety, morals, and general welfare of the

public. Within those powers is each states' right to regulate conduct which affects the health, safety, morals or general welfare of the public. Through this grant of power, the State of Oklahoma has declared by legislation that the commission of "detestable and abominable" conduct "committed with mankind or with beast" is a "crime against nature" and is "punishable by imprisonment. . ." Okla. Stat. Ann. tit. 21, § 886 (West Supp.1984).

The Oklahoma Court of Criminal Appeals has repeatedly confirmed this statute's constitutional validity against challenges alleging overbreadth and vagueness. Clayton v. State, ___ P.2d ___, 55 O.B.A.J. 1786 (Sept. 7, 1984); Carson v. State, 529 P.2d 499 (Okla.Cr. 1974). The Supreme Court itself has upheld this type of statute

against attacks on constitutional grounds. Rose v. Locke, 423 U.S. 48 (1975); Wainwright v. State, 414 U.S. 21 (1973).

Since the commission of homosexual activity violates Okla. Stat. Ann. tit. 22, § 886, Warner v. State, 489 P.2d 526 (Okla. Cr. 1971); Johnson v. State, 380 P.2d 284 (Okla. Cr. 1963), therefore, the advocating, promotion or encouragement of homosexual conduct is to advocate, promote or encourage the commission of a crime.

The Oklahoma legislature has codified standards which specify the qualifications a teacher must hold to be deemed fit to teach. Legislative control over a teacher's qualification is predicated upon a rational foundation, that is, the State's interest in the further-

ance of the educational process of the children.

The educational process is the teaching of the basic skills necessary for the children to function in society. However, education does not stop with the teaching of the basic requirements of reading, writing and arithmetic. The educational system also has the duty to teach the children the basic morals and values of society. The educational process serves as a fundamental basis of the socialization of the children.

Public education is a vital part of the growth of children, teaching the basic skills as well as the responsibilities that membership in a community requires. The importance of the educational process was recognized by the

Supreme Court in 1954 in Brown v. Board of Education, 347 U.S. 483 (1954):

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." (Emphasis added) 347 U.S. at 493.

The State's responsibility to educate the children of the community has not been taken lightly for the simple reason that the responsibility includes the shaping of young minds. It

is that vital responsibility which has been entrusted in the hands of the teachers. Teachers are the backbone of the educational system.

Taking on the responsibility of educating the young, a teacher has by choice, placed himself or herself in a dominant and influential relationship with the children he or she is instructing. A teacher is more than simply a person which recites information to a classroom of students. A teacher has a substantial relationship with each child and holds many different positions in the eyes of children. As the dissent in Goss v. Lopez, 419 U.S. 565 (1975) observed:

"[The normal teacher-student relationship] is an ongoing relationship, one in which the teacher must occupy many roles - educator, adviser, friend, and, at times, parent-substitute." 419 U.S. at 594.

Standing in the shoes of such important and influential position, a teacher is a predominant role model for his students and as such, is, of course expected to publicly serve as an exemplar of those values and skills necessary to attaining civil order by upholding the laws of the state.

Again, homosexual activity is a crime. Therefore, a teacher who advocates homosexual activity is denigrating the laws of the state and the morals and values of the community. Further, such advocacy conveys a message to the students by the teacher that it is acceptable to disobey any criminal law which the student believes is wrong or unjust. The teacher is teaching civil disobedience. In the interest of educating the young, the most vital responsibility that this State carries, the State

cannot allow the "advocating, encouraging, or promoting" of this conduct. To do so would be to allow the teacher to advocate, encourage, or promote criminal behavior.

PROPOSITION II

THE LANGUAGE OF THE STATUTE CLEARLY DICTATES THAT THE PROSCRIBED CONDUCT IS THE ADVOCACY, ENCOURAGEMENT OR PROMOTION OF ACTUAL HOMOSEXUAL SODOMY WHICH CARRIES A SUBSTANTIAL RISK OF DETRIMENTALLY AFFECTING THE STUDENT.

The pertinent language of the challenged statute, Okla. Stat. Ann. tit. 70, § 6-103.15 (West Supp.1984), reads as follows:

"Public homosexual conduct means advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees;

. . .

B. In addition to any ground set forth in Section 6-103 of Title 70 of the Oklahoma Statutes, a teach-

er, student teacher or a teachers' aide may be refused employment, or reemployment, dismissed, or suspended after a finding that the teacher or teachers' aide has:

1. Engaged in public homosexual conduct or activity; and
2. Has been rendered unfit, because of such conduct or activity, to hold a position as a teacher, student teacher or teachers' aide." (Emphasis added).

The Court of Appeals for the Tenth Circuit in the present case held that "advocating, encouraging or promoting" homosexual activity was overbroad and therefore, severable from the remainder of the statute which the court held to be constitutional. 729 F.2d at 1274.

The Court made the following observation in respect to the challenged statute:

". . . The statute does not require that the teacher's public utterance occur in the classroom. Any public statement that would come to the attention of school children, their parents, or school employees that might lead someone

to object to the teacher's social and political views would seem to justify a finding that the statement 'may adversely affect' students or school employees." Id. at 1275.

However, the statute merely regulates the advocacy, encouragement or promotion of actual homosexual sodomy when the advocacy "creates a substantial risk that such conduct will come to the attention of the school children or school employees."

Furthermore, the below listed nexus factors which aid school boards in the requisite determination of fitness of the teacher after such conduct has been performed, insure that such conduct has, in fact, had an adverse affect on the ability and qualifications of a teacher to perform his or her duties.

"C. The following factors shall be considered in making the determination whether the teacher, student teacher or teachers' aide has been rendered unfit for his position:

1. The likelihood that the activity or conduct may adversely affect students or school employees;
 2. The proximity in time or place of the activity or conduct to the teacher's, student teacher's or teachers' aide's official duties;
 3. Any extenuating or aggravating circumstances; and
 4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity."
- Okla. Stat. Ann. tit. 70, § 6-103.15.

These factors impose a narrowing construction upon the statute and insure that the statute be interpreted within the scope of these well defined nexus factors. The nexus factors permit school boards to make individual determinations as to whether the teacher's activity adversely affects the school system. Therefore, the statute when construed as a whole, proscribes only

that conduct which, if performed, is detrimental to the educational progression of the students.

PROPOSITION III

FOR THE PROTECTION OF ITS YOUTH IN THE CONTEXT OF THE PUBLIC SCHOOL SYSTEM, THE STATE MAY REGULATE OBJECTIONABLE SPEECH WHICH COULD ADVERSELY AFFECT THE WELL BEING OF THE CHILDREN OR CAUSE THE DISRUPTION OF THE EDUCATIONAL PROCESS.

In Ginsberg v. New York, 390 U.S. 629 (1968), this Court upheld the conviction of the defendant for selling constitutionally protected pornographic material to a sixteen-year-old boy in violation of a state statute. The Court reasoned that a state may exercise its police powers to protect children from objectionable material.

"[M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children . . . [T]he concept of obscenity or of unprotected matter may vary according to the group to whom the

questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults." 390 U.S. at 636, quoting Bookcase, Inc. v. Broderick, 18 N.Y. 2d 71, 271 N.Y.S.2d 947, 218 N.E.2d 668 (1966). (Emphasis added).

The same basic premise outlined in Ginsberg exists in the present case. This State enacted legislation to protect the well-being of the children. As in Ginsberg, the State's interest is two-fold. First, the parents of the children have the right to raise their children as they see fit, provided, of course, that the parents do so in the best interest of the children and society:

"The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for

children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." Id., 390 U.S. at 639.

Second, the State has its own interest in protecting the well-being of the children:

"While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them." Id., 390 U.S. at 640, quoting People v. Kahan, 15 N.Y.2d 311, 258 N.Y.S.2d 391, 206 N.E.2d 333 (1965).

The State, through the challenged statute, is regulating the conduct of teachers which could have an adverse affect upon the students. Therefore, the State submits that the rationale of Ginsberg must be applied to the present action.

Once the Ginsberg special standard is applied, the State need show only a

rational relationship to a legitimate governmental goal. Id., 390 U.S. at 641-643. The Oklahoma Legislature has made a finding that teachers who advocate, encourage or promote criminal homosexual sodomy could impair the moral and value development of the children. The teachers, by their conduct, are encouraging their students to violate laws which the students may believe are unjust. Therefore, in view of the State's interest in the protection of the development of children, the conduct which the challenged statute proscribes cannot be deemed constitutionally protected speech.

The Supreme Court has repeatedly recognized that the State's interests as an employer "differ significantly from those it possesses in connection with the regulation of the speech of the

citizenry in general.'" Connick v. Meyers, 461 U.S. 138, 140 (1983); Pickering v. Board of Education, 391 U.S. 563, 568 (1968). The problem is one of balancing the interests of the employee as a citizen in commenting upon matters of public concern and the interest of the State, as an employer, "in promoting the efficiency of the public services it performs through its employees.'" Connick, *supra*, 461 U.S. at 140.

In CSC v. Letter Carriers, 413 U.S. 548 (1973), this Court upheld the Hatch Act provisions which prohibited federal employees from taking an active part in political campaigns. In Broadrick v. Oklahoma, 413 U.S. 601 (1973), a statute which prohibited state employees from "tak[ing] part in the management or affairs of any political party or in any political campaign, except to exercise

his right, as a citizen privately to express his opinion and to cast his vote." In CSC in particular, the Court recognized that forbidding partisan political activity would reduce the hazards to fair and effective government and that:

" . . . it is not only important that the Government and its employees in fact avoid practising political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous degree." 413 U.S. at 565.

In the public school system it is also important that a teacher maintain political neutrality and be viewed by the public and students alike as a dispenser of knowledge, not an advocate of social causes.

In Arnett v. Kennedy, 416 U.S. 134, 168 (1974), it was observed that the government, as an employer, must have

wide discretion and control over the management of its personnel and that "[p]rolonged retention of a disruptive . . . employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency."

In Oklahoma the democratically elected state legislature has made a judgment that teachers who advocate homosexual activity may be considered to be unfit if, based upon four factors set forth in Okla. Stat. Ann. tit. 70, § 6-103.15(C), the advocacy may adversely affect students or school employees. It can be assumed that many parents would object to their child being taught by a teacher who advocates conduct which is not only against the law but which is the subject of widespread societal disapproval and is against tenets of

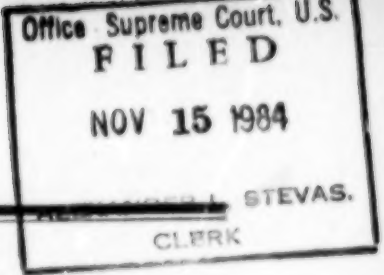
certain religious teaching as well.¹

It, therefore, must be conceded that such an activity undertaken in the community by a teacher would be extremely controversial and disruptive of the educational process.

The State contends that the legislative judgment of Oklahoma in this regard should not be set aside by the federal judiciary. Public schools which desire to remove "gay rights" activists from teaching young children should not be prevented from doing so by the federal court system. This Court has

¹In I Corinthians 6:9-10 and Leviticus 18:22 and 20:13, homosexual activity is strongly condemned. The 1984 Book of Discipline of the United Methodist Church, p. 184, states that the practice of homosexuality is incompatible with Christian teaching, and avowed practicing homosexuals are not to be accepted, or appointed to serve in the United Methodist Church.

No. 83-2030



IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THE BOARD OF EDUCATION OF
THE CITY OF OKLAHOMA,
STATE OF OKLAHOMA,
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

On Appeal from the United States
Court of Appeals for the Tenth Circuit

**BRIEF OF AMICUS CURIAE
THE WASHINGTON LEGAL FOUNDATION
IN SUPPORT OF APPELLANT**

DANIEL J. POPEO
PAUL D. KAMENAR
GEORGE C. SMITH *

WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240

*Attorneys for Amicus Curiae
Washington Legal Foundation*

* Counsel of Record

November 15, 1984

QUESTIONS PRESENTED

1. Whether the Court of Appeals misapplied the balancing test derived from *Pickering v. Board of Education*, 391 U.S. 563 (1968), in simply disregarding the state's compelling interest in protecting the well-being of schoolchildren from the dangers of indoctrination towards illegal homosexual acts.

2. Whether the Court of Appeals misapplied *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), in holding that a statute aimed at preventing both the immediate and long-term danger of such indoctrination or advocacy could only be justified by the imminent likelihood of "substantial disruption" or incitement to lawless action.

3. Whether the Court of Appeals erred in holding the statute facially unconstitutional on "overbreadth" grounds where the statute specifies that no disciplinary action may be taken against an offending teacher without mandatory consideration of listed factors which plainly safeguard against penalizing legitimately protected speech.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF <i>AMICUS CURIAE</i>	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE OKLAHOMA STATUTE IS JUSTIFIED BY THE STATE'S SPECIAL INTEREST IN PROTECTING THE WELL-BEING OF SCHOOLCHILDREN	7
A. Reasonable Restrictions on Unfettered Free Expression May be Justified by the State's Special Obligation to Protect Children.....	7
B. The State's Obligation to Maintain a Safe and Decent Educational Environment Justified Measures to Prevent Teachers From Advocating Homosexual Activity Insofar as it May Impact on Schoolchildren	10
II. THE STATUTE CONSTITUTES A REASONABLE REGULATION RESPECTING THE ACTIVITIES OF GOVERNMENT EMPLOYEES PERFORMING AN ESPECIALLY SENSITIVE TASK	16
A. The Balancing Test Supports the Statute's Constitutionality	17
B. <i>Tinker</i> and <i>Brandenburg</i> Provide No Valid Basis for Striking Down the Statute.....	19

TABLE OF CONTENTS—Continued

	Page
III. THE COURT MISAPPLIED THE OVER- BREADTH DOCTRINE IN HOLDING THE STATUTE UNCONSTITUTIONAL ON ITS FACE.....	21
A. Rejecting State Legislation as Facially Un- constitutional Is Rarely Justified	21
B. The Oklahoma Statute is Plainly Suscepti- ble to a Construction Which Avoids Uncon- stitutional Effects	24
CONCLUSION	26

TABLE OF AUTHORITIES

CASES:	Page
<i>Acanfora v. Board of Educ. of Montgomery County</i> , 359 F. Supp. 843 (D. Md. 1973), <i>aff'd</i> <i>on other grounds</i> , 491 F.2d 498 (4th Cir. 1974), <i>cert. denied</i> , 419 U.S. 836	9, 10
<i>Adler v. Bd. of Ed.</i> , 342 U.S. 485 (1952)	8, 9, 16
<i>Arnett v. Kennedy</i> , 416 U.S. 134 (1974)	23
<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969)	20
<i>Brantly v. Surles</i> , 718 F.2d 1354 (5th Cir. 1983) ..	9, 15
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973)	22, 23, 24, 25
<i>Childers v. Independent School District No. 1</i> , 676 F.2d 1338 (10th Cir. 1982)	17
<i>City of Akron v. Akron Center for Reproductive Health, Inc.</i> , 103 S. Ct. 2481 (1983)	12
<i>Connick v. Myers</i> , 103 S. Ct. 1684 (1983)	16, 17, 18
<i>Dronenburg v. Zech</i> , 741 F.2d 1388 (D.C. Cir. 1984)	5, 18, 19
<i>FCC v. Pacifica Foundation</i> , 438 U.S. 726 (1978) ..	14, 15
<i>Ginsberg v. New York</i> , 390 U.S. 629 (1969) ..	7, 13, 14, 15
<i>Landrum v. Eastern Kentucky</i> , 578 F. Supp. 241 (E.D. Ky. 1984)	16
<i>Pickering v. Board of Educ.</i> , 391 U.S. 563 (1968) ..	16, 17, 18
<i>Prince v. Massachusetts</i> , 321 U.S. 158 (1944)	13
<i>Roe v. Wade</i> , 410 U.S. 159 (1973)	12
<i>Schultz v. Roman Catholic Archdiocese of New- ark</i> , 95 N.J. 530 (N.J. Supreme Ct. 1984)	11
<i>Tinker v. Des Moines Indep. School Dist.</i> , 395 U.S. 503 (1969)	19, 20
<i>United Public Workers v. Mitchell</i> , 330 U.S. 75 (1947)	9, 17
<i>United States v. Carrier</i> , 672 F.2d 300 (2d Cir. 1982)	22, 23
<i>United States Civil Service Comm'n v. National Assoc. of Letter Carriers</i> , 413 U.S. 548 (1973) ..	17, 23
<i>Wainwright v. Stone</i> , 414 U.S. 21 (1973)	5
<i>Waters v. Peterson</i> , 495 F.2d 91 (D.C. Cir.(1973) ..	24
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1976)	8, 21, 22
<i>Younger v. Harris</i> , 401 U.S. 37 (1971)	22

CONSTITUTIONAL AND STATUTORY
PROVISIONS:

	Page
U.S. CONST. amend. I (free speech provision)	<i>passim</i>
Hatch Act, 5 U.S.C. § 7324	4, 9, 17, 23
Oklahoma Statute, Title 21, § 886	5, 11

OTHER AUTHORITIES:

Darrow, et al., <i>The Gay Report on Sexually Trans-</i> <i>mitted Diseases</i> , 71 American Journal of Public Health 1004 (1981)	12
E. Rueda, <i>The Homosexual Network</i> (1982).....	5, 6, 11, 12
U.S. Dept. of Health and Human Services, Centers for Disease Control, <i>Morbidity and Morality</i> <i>Weekly Report</i> (August 1984)	12
<i>Washington Post</i> , Nov. 5, 1984	12

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2030

THE BOARD OF EDUCATION OF
THE CITY OF OKLAHOMA,
STATE OF OKLAHOMA,

Appellant,

v.

THE NATIONAL GAY TASK FORCE,

Appellee.

On Appeal from the United States
Court of Appeals for the Tenth Circuit

BRIEF OF AMICUS CURIAE
THE WASHINGTON LEGAL FOUNDATION
IN SUPPORT OF APPELLANT

INTEREST OF AMICUS CURIAE
WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation (WLF or Founda-
tion) is a national, nonprofit public interest law center,
based in Washington, D.C., that engages in litigation
and the administrative process in matters affecting the
public and national interest. WLF has more than 80,000
members located throughout the United States—includ-

ing in the State of Oklahoma—whose interests the Foundation represents.

WLF files this brief *amicus curiae* in support of the appellant Oklahoma City Board of Education with the written consent of all parties.

WLF devotes a substantial portion of its resources to cases involving the preservation of traditional family values and the defense of the constitutional rights of law-abiding citizens. The Foundation asserts the interests of its members in this area through programs such as its Drug Alert Project, which focuses on judicial and administrative proceedings involving the spread of dangerous drugs in our schools and workplace. WLF has also focused particular attention on the rights of children and their parents to a safe and wholesome public school environment. As part of its activities in that area, WLF recently filed a brief *amicus curiae* in the Supreme Court case of *New Jersey v. TLO*, No. 83-712, arguing that the application of the exclusionary rule to the public school environment would undermine the maintenance of school security, discipline and safety.

WLF's efforts also extend to protecting the religious rights and values of its members when they are threatened by government actions or legal interpretations reflecting hostility toward traditional religious values. Last year, for example, WLF submitted a brief *amicus curiae* in successful support of the City of Pawtucket, Rhode Island's right to display a Christmas Nativity Scene in *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984).

The Tenth Circuit's decision in this case represents a serious assault on the state's power to take preventive measures to assure a safe and wholesome environment in the public schools. The statute struck down by that Court does nothing more than codify a proposition which should be obvious in any sane society: That a public school teacher who publicly advocates and encourages the com-

mission of homosexual sodomy, in a manner likely to be heard by young schoolchildren, has demonstrated at least *prima facie* grounds for dismissal on grounds of unfitness.

If a state may not pass such reasonable legislation to prevent the threat of schoolchildren being proselytized for dangerous and corrupting homosexual practices, then WLF believes our democratic institutions have wandered far astray from their most fundamental purposes.

No reasoned interpretation of the First Amendment bars the states from assuring that public school teachers refrain from conduct or utterances which could corrupt and endanger the schoolchildren entrusted to their influence. The Oklahoma statute at issue validly serves that very purpose. Moreover, it serves to protect the parents' fundamental interest in the direction and control of their children's education—an interest which is also of constitutional dimensions. WLF therefore seeks to advance the interests of its members by seeking reversal of the Tenth Circuit decision striking down this valid and proper exercise of the state's power to regulate public schools.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus curiae* adopts the statement of the case set forth in the brief of appellant Board of Education of the City of Oklahoma.

SUMMARY OF ARGUMENT

1. There is a compelling state interest in safeguarding the well-being, health, and morality of children. That state interest has been repeatedly invoked by this Court to sustain various restrictions on First Amendment activity which threatens the well-being of children. The state's obligation to protect children is all the more grave in connection with the public school's educational process—because the state *requires* parents to send their chil-

dren to school. Public school teachers act as "trustees" for the well-being of schoolchildren. The state is empowered and, in fact, obligated to take necessary measures to assure that no public school teacher engages in conduct or speech which would threaten or injure the physical, psychological, or moral well-being of the children entrusted to him. The Oklahoma statute at issue here represents such a permissible measure, and its underlying purpose—to protect children from inducement to illegal homosexual acts—plainly justifies the limited restrictions on the speech rights of those who aspire to the role of public school teacher.

2. The case law has long recognized that restrictions on the speech of public employees may be sustained even where such restrictions could not be constitutionally applied to the citizenry-at-large. The same general principles which can sustain the legality of the Hatch Act's restrictions on the treasured political expression of federal civil servants surely can support restrictions on the asserted "right" of certain teachers to advocate illegal and dangerous homosexual activity to children. Under the balancing test applied in public employee speech restriction cases, the scales surely must tip in favor of protecting the welfare of children as against a teacher's right to preach the virtues of homosexual activity.

3. The Oklahoma statute does not impermissibly limit discussion on legitimate public issues, nor does it constitute a prior restraint on speech. As such, it is not subject to the more stringent constitutional standards applicable to laws which fit those categories. Rather, this case concerns a challenge to the facial validity of a statute carefully drawn by the legislature to achieve a clearly compelling state interest. A finding of facial invalidity could only be made if the statute is not susceptible to a legitimate construction which would preserve its validity. This statute is intended to be—and readily *can* be—applied in a manner which affects only overt inducement

and advocacy of specific immoral and illegal acts. It certainly does *not* prohibit Oklahoma schoolteachers from legitimate discussion, such as urging the repeal of laws deemed offensive to homosexuals; such discussion is *permitted* under the statute, which applies solely to the actual *advocacy* or *solicitation* of certain sexual acts prohibited by Oklahoma law. So construed, the statute does not intrude on any legitimate First Amendment rights and is plainly constitutional.

ARGUMENT

This case concerns a State Government's right to adopt legislation carefully designed to protect the physical, mental, and moral well-being of schoolchildren. It also brings into sharp focus the trend towards judicial interference with state legislative prerogatives, under the asserted banner of the First Amendment.

As in many other states, certain acts associated with homosexual behavior are illegal and condemned by public policy in the State of Oklahoma. *Oklahoma Statutes*, Title 21, Sec. 886.¹ Notwithstanding the criminal illegality of such practices, there has been an enormous growth in the amount of literature, media programming, and other propaganda which advocates and even exalts the homosexual way of life.² Meanwhile, the serious and tragic health problems and disease associated with homosexual activity have become well-documented.³ Oklahoma

¹ The Supreme Court has upheld the constitutionality of state criminal statutes prohibiting sodomy and kindred acts. *Wainwright v. Stone*, 414 U.S. 21 (1973). There is no constitutional right to engage in homosexual acts. *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984).

² See, Rueda, *The Homosexual Network*, pp. 24-25, 227-230 (Devin Adair, 1982) (hereinafter cited as "Rueda").

³ Most striking in this regard is the well-established correlation between certain homosexual activity and the incidence of the deadly acquired immune deficiency syndrome ("AIDS"), discussed further *infra*.

has joined other states and localities which have grown justifiably concerned that repeated public endorsements of homosexual behavior can have a damaging effect on the impressionable minds of growing children.

Because public school teachers have such a strong influence upon their students, it is important that their special position not be abused. The vast majority of public school teachers serve admirably and honorably in their critical role; the preservation of their collective reputation is essential to the integrity of the public school system.

Yet it is a matter of public record that some homosexual rights groups advocate using the public schools as a forum for openly promoting the virtues of the homosexual lifestyle.⁴ This "gay lifestyle" includes commission of the very sexual acts forbidden by Oklahoma Law and the laws of other states.

The State has a compelling interest in assuring that schoolchildren will not be subjected to advocacy or inducement of homosexual acts by any of the teachers who wield such great influence over them. Such acts not only violate state law, but present a terrible threat to the physical and psychological health of children.

Thus, the State's fundamental interest in assuring the well-being of schoolchildren more than justifies the very narrow and carefully-focused limits on the speech rights

⁴ Rueda, p. 162, quoting the published goals of the Gay Teachers Association of New York City, which included:

"4. To promote curriculum change in all subject areas to enable gay and nongay students to gain a realistic and positive concept of current gay lifestyles. . ." [emphasis added].

There are similar homosexual teachers' associations in Boston, Colorado, San Francisco, Los Angeles, Baltimore, and Ann Arbor, Michigan. *Id.* Books advocating the virtues or acceptability of homosexual behavior have already found their way into grammar school libraries. *Id.* at 230.

of teachers embodied in the statute at issue. *Cf. Ginsberg v. New York*, 390 U.S. 629 (1969) (State has special, overriding interest in protecting children from corrupting influence of indecent materials). In striking down the Oklahoma statute, the Court of Appeals inexcusably ignored this overriding factor.

Significantly, the statute in question in no way purports to exclude homosexuals from serving as public school teachers. It merely provides that those who openly advocate specific homosexual acts have manifested *prima facie* grounds for a determination that they are unfit to serve as public school teachers. This measure is plainly justified by fundamental state interests and entails only an insignificant burden on legitimate First Amendment interests.

I. THE OKLAHOMA STATUTE IS JUSTIFIED BY THE STATE'S SPECIAL INTEREST IN PROTECTING THE WELL-BEING OF SCHOOLCHILDREN.

In declaring the Oklahoma statute unconstitutional on its face, the Tenth Circuit has engaged in unwarranted interference with state legislative prerogatives which are fundamental to the preservation of a safe and decent society. The court's decision demonstrates remarkable insensitivity to the genuine concerns of parents and the State of Oklahoma regarding the danger that overt advocacy by teachers of illegal and unhealthy homosexual practices would pose to the physical and psychological well-being of young schoolchildren. At the same time, the court based its decision on an exaggerated and wholly unrealistic interpretation of the actual impact the statute would have on the legitimate free speech rights of teachers.

A. Reasonable Restrictions on Unfettered Free Expression May be Justified by the State's Special Obligation to Protect Children.

Analysis of this case must begin with recognition of the very special obligations assumed by the state in the

public education of children. The state, after all, compels parents to send their children to school, *see Wisconsin v. Yoder*, 406 U.S. 205 (1976), and most parents find it necessary to send their children to *public* school. It follows that parents and schoolchildren have a legitimate and basic expectation that the public school environment will be a healthy and safe environment. It requires no citation of authority to posit that the state is obliged to take all reasonable precautions to exclude pernicious and corrupting influences from the public educational process.

This principle applies with special force to the critical and sensitive leadership role played by our public school teachers. It was well-stated by this Court in *Adler v. Bd. of Education*, 342 U.S. 485, 493 (1952):

A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as part of ordered society, cannot be doubted.

With that object in mind, the *Adler* decision rejected a First Amendment challenge to a New York law which made membership in certain subversive organizations *prima facie* grounds for teacher disqualification. Referring to the limitations on unfettered speech which are "inherent" in the teacher's role, the Court stated:

Certainly such limitation is not one the state may not make in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence.

The *Adler* decision also stressed that the particular "fitness" which the state may require of its teachers is not confined to classroom conduct alone, but extends to

a broad range of pertinent activities and factors. 342 U.S. at 493.

The courts' approval of regulations affecting the job-related conduct and speech of public school teachers has not been lightly given. Like the long-recognized restrictions on the political expression of certain government officials embodied in the Hatch Act, 5 U.S.C. § 7324, *see United Public Workers v. Mitchell*, 330 U.S. 75 (1947), they are grounded on strong countervailing interests which may sometimes override the predilections of the affected government servant.

In *Brantly v. Surles*, 718 F.2d 1354, 1359 (5th Cir. 1983), for example, the court articulated some of the pertinent considerations which may justify restrictions on the conduct and speech of public school teachers:

The parental interest in the direction and control of a child's education is central to the family's constitutionally protected privacy right.

* * *

The state may legitimately interfere with the constitutionally protected conduct of a public school employee whenever that conduct materially and substantially impedes on the operation or effectiveness of the educational program.

It is hard to conceive of any healthy educational program which would *not* be disrupted by the dissemination of homosexual advocacy by teachers to schoolchildren.

Related considerations were addressed by the court in *Acanfora v. Board of Education of Montgomery County*, 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir. 1974), *cert. denied*, 419 U.S. 836, a case involving a teacher's public remarks in defense of homosexuality.⁸ Importantly, that court was deeply

⁸ In *Acanfora*, the Court of Appeals disagreed with the district court's holding that a gay teacher's repeated media appearances in

troubled by the effect of a teacher's public remarks which did not actually *advocate* homosexual acts, and which would not have been prohibited by the statute here at issue. As that court stated, 359 F. Supp. at 856:

As a result of the distinguishing obligations which a person assumes upon signing a contract to teach children, the standard must shift to accord with the goals of the educational process. The question becomes whether the speech is likely to incite or produce imminent effects deleterious to the educational process.

Concerning the impact of the teacher's publicized statements championing homosexual issues, the court observed (*id.*):

[I]t does not best serve the purposes of sexual adjustment, maturation and student-parent relationships in the educational context. These questions are charged with emotion and of such a delicate and sensitive nature that the injection of controversy tends to breed misunderstanding, alarm and anxiety.

These considerations apply with far greater force where (as here) the speech in question advocates illegal homosexual acts rather than merely defending the legitimate rights of homosexual persons.

B. The State's Obligation to Maintain a Safe and Decent Educational Environment Justified Measures to Prevent Teachers from Advocating Homosexual Activity Insofar as it May Impact on Schoolchildren.

In passing on the validity of the Oklahoma statute, it should be remembered that it was enacted not to harass any homosexual teachers but to protect children. The

defense of homosexuality were simply not protected by the First Amendment, but affirmed on other grounds. But the teacher in *Acanfora* had not *advocated* homosexuality, merely defended it against discrimination. 359 F. Supp. at 856.

state has no plausible reason to impose unnecessary speech restrictions on its teachers—especially when the statute was sure to be forcefully opposed by the well-organized forces which champion the “normalization” of homosexual activity.⁶ That the state is not engaged in an effort to persecute any homosexual teacher is demonstrated by the fact that the statute conspicuously avoids making *private* homosexual activity even *prima facie* grounds for dismissal proceedings—even though such acts are criminal violations under Oklahoma law, *Oklahoma Stats.*, Title 21, Sec. 886.

The language of the statute is carefully circumscribed to reach only speech which would tend to encourage or predispose schoolchildren towards engaging in homosexual acts. Some of the restrictions imposed—i.e., the “soliciting” or “imposing” of homosexual activity—are so obviously unchallengeable that even the Court of Appeals decision excluded them from the portion of the statute held unconstitutional. 729 F.2d at 1275. While the “advocacy,” “encouragement,” or “promotion” of such activities by teachers (i.e., those portions struck down by the panel) may present a less immediate danger to children, they surely constitute a sufficient threat to justify the preventive measures enacted.

The State has a fundamental interest in assuring that schoolchildren will not be subjected to advocacy or inducement of homosexual acts by any of the teachers who wield such great influence over them. Such acts not only violate state criminal law, but present a substantial threat to the physical and psychological health of children.⁷

⁶ See Rueda, Ch. IV, pp. 146-196.

⁷ For a deeply disturbing example of how the imposition of homosexual activity upon children by their mentors can result in fatal psychological disturbance, see *Schultz v. Roman Catholic Archdiocese of Newark*, 95 N.J. 530 (N.J. Supreme Court 1984) (action against archdiocese for negligent hiring of instructor who allegedly imposed homosexual contact on 11-year old boy attending

Notwithstanding the efforts of apologists to invest it with an aura of respectability and legitimacy, there is no escaping the fact that the cultivation of homosexuality is dysfunctional and unhealthy by the standards of any stable and vital society. Most fundamentally—and most indisputably—it undercuts the propagation of mankind and the perpetuation of a vigorous population; that is, it simply negates the procreative essence of sexual activity. Moreover, those who practice exclusive homosexuality are perforce unable to engage in marriage or the formation of natural families. The spread of practiced homosexuality therefore undercuts the preservation of the natural family—the essential foundation of our civilized society. It is well settled that the state has a fundamental interest in preserving the integrity of the family and the procreation of life.⁸

Of more immediate concern, however, is the tangible health and safety threat posed by the encouragement of homosexual practices. It is now a matter of public record that the deadly acquired immune deficiency syndrome (“AIDS”) is conclusively associated with homosexual activity; homosexual (including bi-sexual) males accounted for some 72% of the reported 6,620 cases of AIDS among Americans as of October 29, 1984.⁹ The risk of numerous other sexually transmitted diseases is dramatically increased among practicing homosexuals, as acknowledged in the homosexual media itself.¹⁰

camp, resulting in boy's psychological deterioration and ultimate suicide).

⁸ See, e.g., *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481, 2492 (1983); *Roe v. Wade*, 93 S. Ct. 705, 730-31, 410 U.S. 159, 163 (1973).

⁹ *Washington Post*, November 5, 1984, p. A6, reporting data supplied by the Centers for Disease Control; U.S. Dept. of Health and Human Services, Centers for Disease Control, *Morbidity and Mortality Weekly Report* at 27 (Aug. 1984).

¹⁰ See Rueda at pp. 49-56; Darrow, W.W., et al., *The Gay Report on Sexually Transmitted Disease*, 71 *American Journal of Public Health* 1004 (1981).

These facts demonstrate that the homosexual practices referred to in the Oklahoma statute involve a serious risk to health and safety. Surely the state is justified in taking every reasonable precaution to assure that schoolchildren are insulated as fully as possible from that risk.

It is of particular significance that the Oklahoma statute restricts homosexual advocacy only to the extent that it is likely to come to the attention of schoolchildren. This Court has long recognized that the unfettered exercise of First Amendment rights must sometimes accommodate the state's fundamental interest in protecting the well-being of children. Even where the invasion of protected freedoms may be concerned, “the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.” *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

In *Ginsberg v. New York*, 390 U.S. 629 (1967), for instance, the Court upheld New York's laws prohibiting the sale to minors of sexually suggestive materials which would have been protected by the First Amendment if sold only to adults. In so holding, the Court observed (390 U.S. at 639):

The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations . . . upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful . . . First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of children is basic in the structure of our society . . . The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to

the support of laws designed to aid discharge of that responsibility.

Significantly, the *Ginsberg* decision rejected the inevitable argument that speech restrictions otherwise justified by the child protection principle should be rejected if they pose any threat to protectable adult interests: "We do not demand of legislatures 'scientifically certain criteria of legislation.'" 390 U.S. at 642-43.

The Court further developed this same principle in *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-49 (1978). There, the Court rejected First Amendment arguments challenging the application of FCC regulations to prohibit the broadcast of a "patently offensive" but arguably non-obscene, monologue by comedian George Carlin. Initially, the Court cautioned that judicial interference with regulations governing such offensive matter could *not* be justified on the basis of extreme, hypothetical applications which had not in fact occurred:

Invalidating any rule on the basis of its hypothetical applications to situations not before the court is "strong medicine" to be applied only "sparingly and as a last resort."

The Court then pointed out two characteristics of broadcasters which justify restrictions on their First Amendment freedoms which would not be sustainable if applied at large. First, broadcasters have "a uniquely pervasive presence in the lives of Americans," 438 U.S. at 748. Second, "broadcasting is uniquely accessible to children," *id.*

Significantly, both of these considerations are directly applicable to the status of public school teachers in relation to schoolchildren. They, too, have a "uniquely persuasive presence" in the lives of schoolchildren, insofar as the children are the teacher's "captive audience" for some six hours a day, five days a week. Likewise, the

teacher's pronouncements are "uniquely accessible to children," for the very same reason.

The Court in *FCC v. Pacifica Foundation* then invoked the child protection principle in upholding direct government restrictions on the broadcaster's freedom of expression (438 U.S. at 744):

We held in *Ginsberg v. New York*, 390 U.S. 629, that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression.

The very same principle holds true here. The modest and carefully confined regulation of the public speech of state schoolteachers is firmly grounded on legitimate concern for the well-being of children and the parental right to protect those children from propaganda advocating homosexual sodomy. Thus, the child-protection principle enunciated in *Ginsberg* and *FCC v. Pacifica* provides compelling justification for upholding the Oklahoma statute.

More than that, these cases recognize that the parents' interest in the direction and control of a child's education is central to the family's constitutionally protected privacy rights. See, e.g., *Brantly v. Surles*, *supra*, 718 F.2d at 1359. A given public school teacher's claim to an unfettered right to advocate homosexual behavior is therefore not the only constitutional right at issue here. And while the affected teacher is subjected to this narrow speech restriction only insofar as he chooses to hold his trusted public office, the vast majority of schoolchildren constitute a captive audience in relation to their public school teachers; their dependence on their teachers as an all but mandatory source of information, influence, and guidance gives added weight to the family's interest in the fitness of those teachers.

The legislation at issue should thus be viewed for what it really is: A legitimate component of the standard of fitness which parents and schoolchildren have a fundamental right to expect of public schoolteachers.

II. THE STATUTE CONSTITUTES A REASONABLE REGULATION RESPECTING THE ACTIVITIES OF GOVERNMENT EMPLOYEES PERFORMING AN ESPECIALLY SENSITIVE TASK.

In discounting the compelling concerns which underlie the statute—while misconstruing its carefully modulated impact on protectable speech—the Tenth Circuit misapplied the balancing test which governs functionally-related restrictions on the conduct and expression of public employees entrusted with specially sensitive offices. *Connick v. Myers*, 103 S. Ct. 1684, 1689-91 (1983); *Pickering v. Bd. of Education*, 391 U.S. 563, 568 (1968); *Adler v. Bd. of Education*, 342 U.S. 485, 492-94 (1952). The state's overriding concern with protecting the well-being of schoolchildren surely justifies the narrow and flexible restrictions on potentially corrupting speech which are expressed in the Oklahoma statute.

Aside from the fact that the Oklahoma statute *prohibits no speech* (discussed further, *infra*), its limited effect on First Amendment rights is confined to those who aspire to hold a very special public trust. In giving notice that the public advocacy of illegal homosexual acts will trigger proceedings challenging their fitness as teachers, the statute seeks to assure that the few teachers inclined towards such advocacy will not abuse their influence and control over the children entrusted to them.

Such regulation of the conduct and speech of public employees performing sensitive tasks stands apart from First Amendment restrictions applicable to the general citizenry. *Connick v. Myers*, *supra*, 103 S. Ct. at 1689-91; *Pickering v. Board of Education*, *supra*, 391 U.S. at 568; *Landrum v. Eastern Kentucky*, 578 F. Supp. 241,

246-47 (E.D. Ky. 1984); *Childers v. Independent School District No. 1*, 676 F.2d 1338, 1341-42 (10th Cir. 1982). These cases establish a rational balancing process, in which the importance of the statutory objective is weighed against the resultant limitation on the speech rights of the government employee. If the statute or regulation is reasonably drawn, so that the speech restrictions are minimized, a fundamental state interest will sustain the resultant restriction.

A. The Balancing Test Supports the Statute's Constitutionality.

In *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), for instance, this Court upheld the constitutionality of a federal statute (the Hatch Act, 5 U.S.C. § 7324) which prohibited even an industrial employee of the federal government from exercising his First Amendment right to take an active part in political campaigns. This recognition that the speech or associational rights of public employees must sometimes bow to the greater public good was reaffirmed in *U.S. Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973). Since the general needs of the federal civil service may validly restrict the federal employee's right to participate in wholesome political speech, it is far-fetched indeed to hold that the fundamental obligations of the public educational system may not justify restrictions on a public schoolteacher's "right" to promote and advocate corrupting homosexual activity. Clearly, the Hatch Act decisions provide compelling precedent for upholding the Oklahoma statute.

Related considerations were addressed in the case of *Connick v. Myers*, *supra*, where this Court rejected First Amendment challenges to the discharge of an assistant district attorney for circulating a nettlesome questionnaire to co-workers. Referring to the balancing test enunciated in *Pickering v. Bd. of Education*, *supra*, the Court noted that (103 S. Ct. at 1692):

The *Pickering* balance requires *full consideration* of the government's interest in the effective and efficient fulfillment of its responsibilities to the public. [emphasis added].

On this point alone, the Tenth Circuit's decision should be reversed. That Court gave virtually *no* consideration at all to the harmful effects of teachers advocating the "virtues" of homosexual acts to young schoolchildren.

Moreover, in applying the balancing test to the speech restrictions at issue there, the *Connick* court stressed that:

[W]e do not see the necessity to an employer to allow events to unfold to the extent that the disruption . . . is manifest before taking action.

The Court also stressed that the state's right to impose speech restrictions for legitimate government objectives:

[V]aries depending upon the employee's expression. Although such particularized balancing is difficult, the Court must reach the most appropriate balance of the competing interests," [103 S. Ct. at 1692].

Here, the District Court properly balanced these competing interests and held that the state's interest in protecting children from homosexual indoctrination outweighed the very narrow and qualified restriction on teachers' advocacy of homosexual acts. The Court of Appeals clearly erred in rejecting the District Court's well-reasoned resolution of the competing interests.

While not directly implicating free speech considerations, the D.C. Circuit's recent decision in *Dronenburg v. Zech*, 741 F.2d 1338 (D.C. Cir. 1984), is instructive on the broader issues involved in this case. In *Dronenburg*, the Court rejected the plaintiff's argument that the Navy's policy of mandatory discharge for homosexual conduct (including "solicitation") violated his constitutional right to privacy and equal protection. The

D.C. Circuit (per Bork, J.) squarely denied the existence of any constitutional right to engage in homosexual conduct (*Id.* at 20). Moreover, in describing the powerful state interests which plainly justified the Navy's policy requiring the discharge of those who engage in homosexual conduct, the Court stressed that "legislation may implement morality" and pointed out the dangers to institutional morale and good order posed by homosexual behavior. (*Id.* at 21).

If such considerations are enough to sustain restrictions on homosexual behavior among grown men in the U.S. Navy, how much more compelling may they be in the educational environment surrounding developing schoolchildren?

B. Tinker and Brandenburg Provide No Valid Basis for Striking Down the Statute.

The Tenth Circuit erred further in misapplying the holding of *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), where the Court upheld a student's First Amendment right to wear black arm-bands as a symbolic political protest. In *Tinker*, the Supreme Court stressed the passive, non-disruptive nature of the symbolic protest, and stated that prohibitions against such expressions of opinion by students can be justified only if they would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," 393 U.S. at 509. At the same time, the Court acknowledged that "the special characteristics of the school environment" may entail necessary constraints on First Amendments rights. 393 U.S. at 506. The Court further stressed that (*id.* at 507):

On the other hand, the Court has repeatedly emphasized *the need for affirming the comprehensive authority of the states and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools* [emphasis added].

The Tenth Circuit read *Tinker* to require a demonstration of imminent and substantial disruption of educational operations in order to justify *any* restriction on speech in the school setting. It then reversed the District Court by misapplying this interpretation of the *Tinker* decision.

Here, the application of a test involving "substantial disruption of discipline" (or "clear and present danger") is unsuitable and inapposite to the issue at stake. Unlike in *Tinker*, the expression at issue here is not student behavior adverse to school discipline but teachers' statements which are detrimental to a healthy and wholesome educational atmosphere. The danger which the legislation confronts is not merely the outrageous case involving the overt seduction of a pupil; it extends as well to the long-term effects of pro-homosexual indoctrination to cultivate the notion that homosexual acts are "good" and part of a perfectly legitimate "alternative lifestyle."

While it may well be impossible to shelter children from such propaganda altogether in today's permissive society, it is another matter for the state to condone its dissemination by public school teachers to their young charges. If public school teachers publicly advocate the "benign" nature of homosexual activity, the advocacy is invested with a considerable degree of authority in the eyes of schoolchildren. The teacher's advocacy tends to place the weight and imprimatur of the school—even the state—behind the concept, and is likely to create confusion and consternation in the minds of young pupils.

These institutional considerations are more akin to those involved in the Hatch Act cases, *supra*, and should not be judged under the inappropriate standard of "substantial disruption" of school operations.¹¹ The more ap-

¹¹ For essentially the same reasons, the standard of "inciting imminent lawless action," taken from *Brandenburg v. Ohio*, 395 U.S. 444 (1969) is also inapposite to this particular regulation. The evil addressed by this statute is likely to occur in secrecy, and the State can hardly be required to prove that the acts in question are "imminent" before taking preventive measures.

propriate standard is whether the affected speech presents a *substantial threat to the well-being of young schoolchildren*. Since this statute is confined to speech which advocates or encourages unhealthy and illegal acts (as opposed to, e.g., a mere philosophy or lifestyle), it easily complies with such a standard.

In any event, the Oklahoma statute would pass muster under a reasonable application of even the "substantial disruption" test. The statute carefully provides that a teacher who engages in the kind of homosexual advocacy affected "*may*" (not "*shall*") be disciplined only upon a determination that the advocacy itself was such as to render him "unfit." Subsection C then specifies a list of factors which *must* be taken into account in making the ultimate fitness determination.

The cumulative import of the factors listed—adverse effect on students; tendency to dispose children toward criminal sodomy; repeated or continuing nature of the advocacy of such deviance—would clearly amount to a "material and substantial disruption" in the mind of any objective observer. On the other hand, "fair comment" on homosexual issues in appropriate adult forums would plainly be protected under any fair application of Subsection C's list of extenuating factors. Thus, only by assuming that those who enforce the statute will arbitrarily disregard its specific standards can the statute be construed as overbroad. Since such an assumption is not for the courts to make, there is no lawful justification for the Tenth Circuit's decision.

III. THE COURT MISAPPLIED THE OVERBREADTH DOCTRINE IN HOLDING THE STATUTE UNCONSTITUTIONAL ON ITS FACE.

A. Rejecting State Legislation as Facially Unconstitutional for Overbreadth Is Rarely Justified.

In *Wisconsin v. Yoder*, *supra*, this Court stressed that the maintenance of an effective public school system "ranks at the very apex of the functions of a State."

406 U.S. at 205. The statute in question here represents the sound judgment of the Oklahoma legislature on a difficult issue lying at the core of that educational function—the teacher/student relationship. Yet the Tenth Circuit struck down the statute solely on the basis of fears as to its hypothetical application, with no reference whatsoever to the regulation's underlying objectives or its likely application in actual practice. The Court of Appeals ruling represents an insupportable misuse of the doctrine of “facial” unconstitutionality for alleged “overbreadth.”

In *Yonger v. Harris*, 401 U.S. 37, 52 (1971), Justice Black stressed that the federal judicial power to resolve concrete disputes “does not amount to an unlimited power to survey the statute books and pass judgment on laws before courts are called upon to enforce them.” For these reasons, this Court has stressed that decisions based on a statute's facial overbreadth are an “exception to the traditional rules of practice” and their “function is a limited one.” *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). As further stressed in *Broadrick*, 413 U.S. at 613, a statute should not “be discarded in toto because some person's arguably protected conduct may or may not be caught or chilled by the statute.” The Court further stated:

Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. *Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.* [Emphasis added.]

Nor is facial overbreadth adjudication appropriate merely because a statute could conceivably be used to affect constitutionally protected speech. As the Second Circuit observed in *United States v. Carrier*, 672 F.2d 300, 306 (2d Cir. 1982), “The fact that an issue of free

speech arises creates no exception to the principle that courts are not legislators.”

Thus, in *Arnett v. Kennedy*, 416 U.S. 134 (1974), this Court rejected an overbreadth challenge to a federal statute providing for the discharge of civil service employees for “such cause as will promote the efficiency of the service.” The plaintiff had been removed from his position under this provision for making allegedly defamatory statements (allegations of bribery) about fellow employees.

Recognizing that the statute authorized dismissal for speech as well as other conduct, the Court stressed that the act “did not intend to authorize discharge [for] speech which is constitutionally protected.” The Court refused to assume that the statute's broad and imprecise prohibition—far broader and far more imprecise than the statute at hand here—would be abused to threaten genuine First Amendment rights. This same principle of respect and deference for the lawful intent and objectives of the legislature was reflected in this Court's rejection of a renewed “facial” challenge to Hatch Act restrictions on political expression in *U.S. Civil Service Commission v. National Ass'n of Letter Carriers*, *supra*.

The prudent judicial restraint reflected in cases such as *Broadrick*, *Arnett*, and *Letter Carriers* decisively militates against the reflexive approach to “facial overbreadth” challenges adopted by the Tenth Circuit below. Indeed, had this Court applied the type of “worst case” analysis used by the Tenth Circuit—i.e., measuring the law's validity on the basis of the most unfavorable application which challenging counsel can hypothesize—then the Hatch Act and numerous other public employee regulations approved by this Court would be stricken from the statute books.

The Tenth Circuit clearly erred in applying a mechanical, “worst case” version of the “facial overbreadth”

doctrine to this narrow and carefully drafted regulation of public school teachers.

B. The Oklahoma Statute is Plainly Susceptible to a Construction Which Avoids Unconstitutional Effects.

The Court of Appeals decision disregarded the critical admonition that a statute should not be condemned merely because "some person's arguably protected speech" might somehow be caught or chilled by its misapplication. *Broadrick, supra*, 413 U.S. at 613. Rather than considering the potential dangers which the legislature so obviously intended to reach—e.g., teachers indoctrinating their pupils to the view that proscribed homosexual acts are natural or healthy, or actually encouraging them to experiment with such acts—the panel seized upon remote scenarios which the statute is plainly *not* designed to affect.

This approach distorts the proper role of judicial review. If the statute is readily subject to a reasonable, narrowing construction, the court should adopt that construction in passing on the statute's constitutionality. *Broadrick, supra*, 413 U.S. at 613. This principle applies with added force in the case of non-criminal regulations limited to public employees such as teachers, where the state's supervisory competence is entitled to considerable deference. See *Waters v. Peterson*, 495 F.2d 91, 99 (D.C. Cir. 1973). The courts simply should not assume that the states will apply such regulations harshly or with disregard for the Constitution.

Only by positing the most extreme and unseemly application of the Oklahoma law was the court able to improvise a rationale for striking it down. Thus, the court promptly seized upon the law school-style hypothetical of a teacher wishing to testify before the state legislature in favor of abolishing the state's anti-sodomy

statute. Supplying the hypothetical teacher with a hypothetical script—carefully phrased to violate the letter of the statute while advocating homosexual activity in the most "respectable" fashion—the court assumed that the statute would likely be applied to such situations and thereby invade "the core of First Amendment protections."

Not only is this "worst case"-hypothetical approach improper, *Broadrick*, 413 U.S. at 613, but there is no reasonable basis to assume that this statute would result in *any* penalty for the kind of speech posited. The statute does not *prohibit* advocacy of the type portrayed in the court's hypothetical; it merely provides that such speech may form the basis of a fitness inquiry which evaluates the speech in relation to specific factors reflecting the state's legitimate concerns respecting harm to schoolchildren and the educational process. Those factors, enumerated under Subsection C of the statute, would manifestly preclude its application to responsible advocacy of homosexual rights in appropriate adult forums.

Thus, a teacher's exercise of the First Amendment right to testify before the legislature would likely qualify as an "extenuating circumstance" under Factor 3. Similarly, the factors concerning likely adverse effect on students, proximity to the teacher's duties, and the repetitive or continuing nature of the conduct would also persuasively militate against an "unfitness" finding with respect to the posited testimony or similar protectable expression. The inclusion of these exculpatory factors in the statute clearly reflects the State's concern and sensitivity for the teacher's legitimate speech rights. Since consideration of these factors is a *mandatory* component of the ultimate determination of fitness or unfitness, there is no credible basis for concluding that the statute would be arbitrarily used to punish speech which is not within the legitimate area for regulation.

These considerations render the statute "readily subject" to a constitutional construction, and the District Court so found. The Court of Appeals erred in holding to the contrary.

CONCLUSION

The statute challenged in this case represents the responsible, good-faith efforts of the Oklahoma legislature to address a subject of legitimate and fundamental concern. Judicial review of its validity should appreciate its genuine concern for the well-being of schoolchildren and its very limited application. The statute is carefully framed to reach only the advocacy or encouragement of illegal homosexual acts in a manner likely to impact on schoolchildren. It includes built-in safeguards to prevent its misapplication to legitimately protected speech. In light of these considerations, the Court of Appeals erred in condemning the statute as facially unconstitutional. The Tenth Circuit's decision should therefore be reversed.

Respectfully submitted,

DANIEL J. POPEO

PAUL D. KAMENAR

GEORGE C. SMITH *

WASHINGTON LEGAL FOUNDATION

1705 N Street, N.W.

Washington, D.C. 20036

(202) 857-0240

Attorneys for Amicus Curiae

Washington Legal Foundation

* Counsel of Record

November 15, 1984

NOV 15 1984

IN THE
Supreme Court of the United States
October Term, 1984

ALEXANDER L. STEVAS,
CLERK

THE BOARD OF EDUCATION OF THE CITY OF
OKLAHOMA CITY, STATE OF OKLAHOMA
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

On Appeal from the United States
Court of Appeals, Tenth Circuit

[REDACTED]
[REDACTED] BRIEF AMICUS CURIAE
IN SUPPORT OF APPELLANT.

GWENDOLYN H. GREGORY
Deputy Legal Counsel

National School Boards Association
1680 Duke Street
Alexandria, Virginia 22314
(703) 838-6712

AUGUST W. STEINHILBER
NSBA Associate Executive Director and
Legal Counsel

THOMAS A. SHANNON
NSBA Executive Director

51/28

No. 83-2030
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

The Board of Education of the City of
Oklahoma City, State of Oklahoma,
Appellant,
v.

The National Gay Task Force,
Appellee.

CONSENT TO FILING

Counsel for Appellant and Appellee have
consented by telephone to the filing of the
within brief by the National School Boards
Association. Confirming letters will be filed
with the Court.

Respectfully submitted,

GWENDOLYN H. GREGORY
Counsel of Record

TABLE OF CONTENTS

INTEREST OF THE <u>AMICUS CURIAE</u>	1
ISSUE PRESENTED FOR REVIEW	3
ARGUMENT	4
I. Introduction	4
II. The Nature of the Free Speech Right of Teachers	6
A. Public Empllyee Speech - Efficiency of Government Operation	6
B. Political Speech - "Substantial Disruption"	11
C. Immoral or Illegal Conduct	13
III. Harmful Effect on Students of Illegal or immoral Activites of Teachers	21
Conclusion	40

TABLE OF AUTHORITIES

CASES:	Page
<u>Acanfora v. Board of Educ.</u> , 359 F. Supp. 843 (D. Md. 1973), <u>aff'd on other grounds</u> , 491 F.2d 489 (4th Cir. 1974), Ct. Denied, 405 U.S. 1046 (1972).....	17, 35, 36
<u>Adler v. Board of Education</u> , 342 U.S. 485, 493	27
<u>Ambach v. Norwick</u> , 99 S.Ct. 1589.....	26
<u>Avery v. Homewood City Bd. of Educ.</u> , 674 F.2d 337 (5th Cir. 1982).....	18, 19
<u>Bernasconi v. Tempe Elementary School District No. 3</u> , 548 F.2d 857 (9th Cir. 1977).....	10
<u>Board of Educ. of Long Beach v. Jack M.</u> , 566 P.2d 602 (Cal. 1977).....	18
<u>Board of Educ. v. Pico</u> , 102 S.Ct. 2799, 2807 (1982).....	25, 37
<u>Brandenburg v. Ohio</u> , 395 U.S. 444 (1980)..	14, 20, 30
<u>Daulton v. Affeldt</u> , 678 F.2d 487 (4th Cir. 1982).....	11
<u>Doe v. Commonwealth's Attorney</u> , 403 F.Supp. 1199 (E.D. Va. 1975) <u>aff'd mem.</u> , 425 U.S. 901 (1976).....	28, 36

<u>Drake v. Covington City Bd. of Educ.</u> , 371 F. Supp. 974 (M.D. Ala. 1974).....	18
<u>East Hartford Education Association v. Board of Education</u> , 562 F.2d 838 (2d Cir. 1977)	23
<u>Gambino v. Fairfax County School Board</u> , 564 F.2d 157 (4th Cir. 1977).....	14
<u>Ginsberg v. State of N.Y.</u> , 88 S.Ct. 1280 (1968)	24
<u>Givhan v. Western Line Consolidated School Dist.</u> , 439 U.S. 410 (1979).....	10
<u>Golden v. Board of Educ.</u> , 285 S.E.2d 665 (W. Va. 1981).....	20
<u>James v. Board of Educ.</u> , 461 F.2d 566 (2d Cir. 1972).....	31
<u>Lemons v. Morgan</u> , 629 F.2d 1389 (8th Cir. 1980)	11
<u>McConnell v. Anderson</u> , 451 F.2d 193 (8th Cir. 1971), Ct. Denied, 405 U.S. 1046 (1972).....	17
<u>Milliken v. Bradley</u> , 94 S.Ct. 3112 (1974).....	23
<u>Pickering v. Board of Education</u> , 391 U.S. 563 (1968).....	6, 8
<u>Prince v. Massachusetts</u> , 321 U.S. 158 (1944)...	24
<u>Shelton v. Tucker</u> , 364 U.S. 479, 485 (1960)....	27
<u>Skripchuk v. Austin</u> , 379 A.2d 1142 (Del. Super. Ct. 1977).....	20
<u>Tinker v. Des Moines Independent Community School District</u> , 393 U.S. 503	

(1969).....11, 12, 13, 23, 30, 31

Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977)
Ct. Denied 435 U.S. 925 (1977)..... 13

Trotman v. Board of Trustees of Lincoln University, 635 F.2d 216 (3rd Cir. 1980)..... 11

OTHER AUTHORITIES:

Free Speech Rights of Homosexual Teachers,
Columbia Law Review 1524 (1980)..... 34

Sex Litigation and the Public Schools 41,
E. Bolmeier, The Michie Company, 1975..... 16, 38

Teacher Dismissal for Immoral and Illegal Conduct, F. Delon, 1982 School Law Update 154
(National Organization on Legal Problems of Education 1983)..... 15

West Virginia Schools Can Fire Homosexual Teachers on 'Reputation', Education Times,
(March 7, 1983)..... 29, 16

No. 83-2030

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

The Board of Education of the City of
Oklahoma City, State of Oklahoma,
Appellant,

v.

The National Gay Task Force,
Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS, TENTH CIRCUIT

AMICUS CURIAE BRIEF OF
THE NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF APPELLANT

INTEREST OF THE AMICUS

The National School Boards Association
(NSBA) is a nonprofit federation of this
nation's state school boards associations,

the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The school boards of this country are charged with the responsibility for, not only the education of the children within their charge, but also the inculcation of the moral values of the community in which they are located.

The decision below not only invalidates a state statute but also tells school boards across the land that they must allow "unfit" teachers to remain in

the classroom if the subject of their unfitness in any way implicates first amendment rights. The decision holds that a teacher's first amendment rights stand on a higher plane than the right of students, required by law to be present in the classroom, to be assured that their teachers are fit to stand as role models.

ISSUE PRESENTED FOR REVIEW

Whether a school board may constitutionally dismiss, suspend or refuse to employ, a teacher, student teacher or teachers' aide because that person engaged in public homosexual conduct or activity (as defined in Oklahoma statutes) where the board has taken into account those factors set forth in the statute and, based on those factors, has found that the employee is unfit to teach.

ARGUMENT

I. INTRODUCTION

The case at bar concerns the constitutionality of a state statute which authorizes school boards to take adverse action against teachers and others who deal directly with students in the classroom when these employees' public statements have a direct relationship to his or her fitness to teach.

It may be inappropriate for Amicus, as a representative of local school boards across the country, to take a position on a state statute which merely authorizes such action. However, the lower court decision is so broad that, if upheld, the holding would immunize school teachers across the land from adverse action taken by the school board, on morality grounds, if the

action was based upon public statements of the teacher.

Amicus has no position on the question of whether sensitive personnel questions such as that presented here should be addressed in a state statute. It could be argued that such matters should be handled strictly by the local jurisdiction and the State should not involve itself in the issue.

However, the decision below not only invalidates a state statute, it also invalidates the criterion used by local school boards in determining whether teachers employed by them are fit to teach. If affirmed, the decision will seriously erode the ability of school boards to assure the health and safety of the children within their charge.

II. THE NATURE OF THE FREE SPEECH RIGHT OF TEACHERS

A. Public Employee Speech - Efficiency of Government Operation

The Supreme Court cases involving speech rights of school district employees arise out of adverse action against teachers because of their statements critical of school board policies. The rules which have been laid down by the Court in these cases relate to the effect of the statements on the management of the schools, rather than to the issue of the effectiveness of the teacher in the classroom.

The leading Supreme Court case on free speech rights of teachers, Pickering v. Board of Education, 391 U.S. 563 (1968), involved a school board that dismissed a

teacher for publicly criticizing school board policies relating to allocation of school funds.

The Court upheld the teacher's right to speak on this matter of public interest, although recognizing the difference between private citizens and public employees:

[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees...[Emphasis supplied.]

Because of the enormous variety of factual situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnishing grounds for dismissal, we do not deem

it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. Id at 569.

The court of appeals below places reliance, in part, on Pickering. However, the case is inapposite. First, Pickering limits the first amendment rights of public employees, such speech not being entitled to the same level of protection as speech of private citizens. Second, the standard in Pickering for determining whether the employee's speech is protected is not relevant here, because Pickering involved political speech. That speech is protected, even when made by an employee, unless the particular nature of the employee's position in the schools and the nature of the comments made (i.e. their relationship to the workings of the school

district) justify the action of the school board in dismissing the teacher in light of its interest in "promoting the efficiency of its operations."

Here the public employee is not subject to disciplinary action because of the political nature of his speech, but because of the immoral nature of the speech. Further, the statute at issue here does not apply to all public employees, but only to those employees who have direct contact with students.

Arguably, if the speech seriously affects the students, then the speech also seriously affects the efficiency of the operation of the school district. However, efficiency is less important here than the welfare of the students.

The other leading Supreme Court case

on teacher free speech rights is Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1979), in which the Court held that the first amendment protects critical statements made in private by a teacher to a superior. In contrast, the statute at bar concerns only public statements which are shown to have come to the attention of the students.

Lower court decisions also involve the issue of the effect of teacher statements on the ability of the school board and its administrators to manage the schools, an issue which is equally important in any other public agency. See, e.g., Bernasconi v. Tempe Elementary School District No. 3, 548 F.2d 857 (9th Cir. 1977) (complaint

that Mexican children were being placed in special education classes based on tests given in English rather than in Spanish); Daulton v. Affeldt, 678 F.2d 487 (4th Cir. 1982) (a critical evaluation of a community college's class scheduling and curriculum changes by an instructor); Lemons v. Morgan, 629 F.2d 1389 (8th Cir. 1980) (a radio station manager who broadcast editorials which were not complimentary of the school board or superintendent); Trotman v. Board of Trustees of Lincoln University, 635 F.2d 216 (3rd Cir. 1980) (a group of professors who opposed their university president's proposal to increase the student-faculty ratio).

B. Political Speech - "Substantial Disruption"

The lower court also places reliance on the standard set out in Tinker v. Des

Moines Independent Community School District, 393 U.S. 503 (1969) which also involves political speech and which stands for the proposition that student speech is protected unless it "substantially disrupts" the educational process.

The cases focusing on the analysis in Tinker concern political statements which do not involve the administration of the schools. Such statements also enjoy first amendment protection, provided they do not result in "substantial interference or disruption in the normal activities of the school."

We are dealing in the case at bar not so much with "disruption" of the educational process, as with the welfare of the students. Students may be subjected to serious harm by being forced to remain in the classroom with an unfit teacher, but

yet it might be difficult to show that the school is "substantially disrupted."

C. Immoral or Illegal Conduct

Lower court decisions on the subject of political speech of students are quite consistent; however, when the subject of the speech raises questions of obscenity or morality, the courts diverge in their application of the "substantial disruption" standard of Tinker, supra.

For example, in Trachtman v. Anker, 563 F.2d 512, (2d Cir. 1977), cert. denied, 435 U.S. 925 (1977), the court upheld the denial of a high school newspaper editor's right to distribute a questionnaire surveying the sexual activities and birth control practices of his fellow students. The ground for the denial was that the results of the survey might invade the

privacy of younger students, who might not be mature enough to handle the story's intimate information.

In contrast, the Fourth Circuit in Gambino v. Fairfax County School Board, 564 F.2d 157 (4th Cir. 1977), ruled that a student newspaper is a public forum and therefore entitled to first amendment protection when it carried a story on birth control methods.

On the question of the statute's prohibition of advocacy of illegal acts, the majority below also relies on Brandenburg v. Ohio, 395 U.S. 444 (1980). However, that case merely stands for the proposition that a citizen cannot be subjected to criminal penalties for advocating illegal activity, in the absence of a showing that the advocacy also incites

to "imminent lawlessness."

There is a wide body of law on the question of teacher dismissals for immoral or illegal conduct. Traditionally, the courts accepted a "reasonable cause" for termination if it were shown that the conduct outside the classroom "set a bad example" for students. Later state courts began to use a "nexus" standard which required the board to show that the outside conduct bears a relationship to the teacher's fitness to teach. F. Delon Teacher Dismissal for Immoral and Illegal Conduct, 1982 School Law Update 154 (National Organization on Legal Problems of Education 1983).

At least one state attorney general has opined that "no constitutional right to

a deviant sexual preference" exists and thus, his argument goes, school boards may dismiss teachers who have a reputation of homosexuality, because in that state homosexuality is considered immoral. West Virginia Schools Can Fire Homosexual Teachers on 'Reputation', Education Times, (March 7, 1983).

Although most courts do not go that far, they do scrutinize questionable sexual behavior of teachers more closely than other public employees. E. Bolmeier, Sex Litigation and the Public Schools 41, The Michie Company, 1975).

Several lower federal court cases have upheld the dismissal of homosexual employees upon a showing of an adverse

effect on the educational process. See, e.g., Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md. 1973), aff'd on other grounds, 491 F.2d 489 (4th Cir. 1974), cert. denied, 405 U.S. 1046 (1972); McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971), cert. denied, 405 U.S. 1046 (1972).

In Acanfora, the court recognized that knowledge of the homosexuality of the teacher was not enough to subject him to disciplinary proceedings, nor was his attendance at public gatherings and speaking out on the subject. However, the court held that where the teacher's conduct sparks controversy and produces imminent effects which are deleterious to the educational process, disciplinary action could be taken.

State cases as well impose this nexus

requirement, ie that it must be shown that the homosexuality of the teacher in some way adversely affects the students and the educational environment. See, e.g., Board of Educ. of Long Beach v. Jack M., 566 P.2d 602 (Cal. 1977).

Courts have upheld this nexus requirement in other cases involving morality, holding that teachers have a right to privacy and the school board must show a connection between the alleged immoral conduct of the teacher and the teacher's fitness to teach. Drake v. Covington City Bd. of Educ., 371 F. Supp. 974 (M.D. Ala. 1974), Avery v. Homewood City Bd. of Educ., 674 F.2d 337 (5th Cir. 1982).

The dissent in the case at bar relied on the illegality of the activity, stating

that "sodomy is malum in se, i.e., immoral and corruptible in its nature without regard to the fact of its being noticed or punished by the law of the state." Jurisdictional Statement, Appendix at 10a. Thus, the dissent argues, such conduct is not entitled to first amendment protection. "In the context of the public school system involving the teacher-student relationship, it cannot be said that the advocacy of such action is mere advocacy of an abstract doctrine or belief.", Id. at 12a.

State cases involving illegal, rather than merely immoral conduct, are not consistent. Some continue to require a factual showing of a connection between the illegal conduct and the fitness of the

teacher to teach. Golden v. Board of Educ., 285 S.E.2d 665 (W. Va. 1981). Others hold that the mere conviction of a felony is enough to show a nexus. Skripchuk v. Austin, 379 A.2d 1142 (Del. Super. Ct. 1977).

The majority's reliance on Brandenburg is misplaced. That case involved a private citizen who was prosecuted solely because of the content of his speech, not because of any adverse consequences which resulted from the speech. The case did not involve public school teachers who because of their position are subject to a higher standard of conduct. And, most importantly, that case did not involve a statutory requirement of nexus where the State must prove that the speech will result in serious damage to a vital state interest.

III. HARMFUL EFFECT ON STUDENTS OF ILLEGAL OR IMMORAL ACTIVITIES OF TEACHERS

The issue which the Court must resolve here is whether the State may declare that homosexuality is a subject which a school board may, without contravening the first amendment, treat differently than other subjects when making decisions as to the hiring or retention of public school teachers.

Since there are no facts upon which the Court can base its decision, it would seem that the Court must decide: first, whether the Constitution permits a school board to dismiss, or otherwise adversely treat, a teacher where the speech relating to his or her homosexuality is shown to affect the teacher's fitness to teach and;

second, if there are situations where a school board could so act, the Court must then decide if there are ample criteria in the statute to assure that a school board, acting pursuant to the statute, has sufficient evidence to warrant the action taken against the teacher.

As noted above, Amicus has no position on the merits of the statute itself, but urges this Court not to overturn the statute without noting that a board would have authority to take action against a teacher for public advocacy of illegal or immoral activity, such as homosexual activity, where the advocacy is shown to affect the teacher's ability to teach.

Having concluded, then, that the cases cited in the majority opinion below are not applicable here, what then should be the

standard for this Court's review?

Courts have long recognized the need of the State to inculcate community values and to protect young children, from outside influences which may be detrimental to that end. Milliken v. Bradley, 94 S.Ct. 3112 (1974); East Hartford Education Association v. Board of Education, 562 F.2d 838 (2d Cir. 1977).

Although neither students nor teachers "shed their rights at the schoolhouse door", Tinker v. Des Moines Independent Community School District, supra, the Supreme Court has recognized that the free speech protections afforded children differ from those afforded adults. "[T]he power of the state to control the conduct of children reaches beyond the scope of its authority over adults, as is true in the

case of other freedoms...." Prince v. Massachusetts, 321 U.S. 158 (1944).

Differences are also recognized between adults as citizens as adults who are dealing with children. For example, the state could not constitutionally prohibit vendors from selling "obscene" materials to adults but it could prohibit vendors from selling the same merchandise to minors. In Ginsberg v. State of N.Y., 88 S.Ct. 1280 (1968), the Court stated: "Even where there is an invasion of protected freedoms, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults...."

In recent years the Supreme Court has also reaffirmed its recognition of the role which the public schools play in "the

preparation of individuals for participation as citizens' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system,' and that "'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.'" Board of Educ. v. Pico, 102 S.Ct. 2799, 2807 (1982).

In 1979 the Court, in a case challenging the constitutionality of a New York statute denying teaching certificates to aliens, held that the State had met its burden of showing that a rational relationship existed between the classification and the State's need to assure that all those who deal directly with public school children in the

classroom are U.S. citizens. Ambach v. Norwick, 99 S.Ct. 1589.

Justice Powell, writing for the majority, stated:

"Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society.

"No amount of standardization of teaching materials or lessor plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitude of students toward government, the political process and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy. (Emphasis supplied."

The district court below noted cites

the Supreme Court decision in Shelton v. Tucker, 364 U.S. 479, 485 (1960) to evidence the special role of the public schools and the role of the public school teacher:

There can be no doubt of the right of the State to investigate the competence and fitness of those whom it hires to teach in its schools, as this Court before now has had occasion to recognize. 'A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern.' Adler v. Board of Education, 342 U.S. 485, 493. There is 'no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors. [cite omitted]

Certainly the First Amendment precludes the state from taking adverse action against a teacher solely because of that person's status as a homosexual, although apparently the State does have the

power to declare homosexual activities illegal. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975) aff'd mem., 425 U.S. 901 (1976).

Thus, the next step is to determine whether the State can take action against employees who engage in those activities. Even the Court of Appeals below noted that the statute relating to teachers engaging in "homosexual activity" passes Constitutional muster. Jurisdictional Statement, Appendix page 8a.

Finally, the question arises as to whether action can be taken against employees who merely speak on the prohibited subjects.

The state of the art of psychiatry is simply not such that anyone can state with certitude that certain susceptible students

will become homosexual because they are taught by homosexual teachers. Thus, such a contention cannot authorize the state to take action to eliminate all homosexual teachers from the public schools. It is indeed doubtful that any court would uphold the West Virginia Attorney General opinion, supra.

The question here, however, is not whether a school board may constitutionally take adverse action against an employee because he or she is homosexual. The question is whether the state can take such action where it is shown that the person's advocacy of homosexual activity is such that (1) it will come to the attention of school children and (2) the person is rendered unfit because of such action, to hold a position as a teacher. The burden

is on the school board to show the standard of "unfitness" has been met. Although, the burden may not be easy to overcome, nevertheless the school board should be allowed to attempt to meet it.

The court below relies on two Supreme Court cases for its decision. Brandenburg and Tinker, supra. Brandenburg involved a defendant convicted of "advocating" a criminal act. The Court distinguished between "mere advocacy" and "incitement to imminent lawless action", 395 U.S. 444, 449.

In the instant case, school boards are not authorized to terminate teachers merely because they advocate homosexual activity. They can be terminated only if that advocacy results in their being rendered unfit to teach.

The court below relies on Tinker for the proposition that a teacher's free speech right is outweighed by the interest of the state only where it is shown that the "expression results in a material or substantial interference or disruption in the normal activities of the school."

Tinker, school officials disciplined students for wearing black armbands as a symbolic protest against the Viet Nam War. The state's underlying motivation to suppress as unpatriotic the protest of U.S. involvement in the Viet Nam War, was not relevant and would not countervene the students' right to silent protest. Similarly, the same rule applies to the silent protest of teachers in the classroom, James v. Board of Educ., 461 F.2d 566 (2d Cir. 1972), the only

legitimate interest of the State in either case being to assure order in the classroom.

In the case at bar, however, the "disruption" standard is difficult to apply. Here, the statute does not authorize school boards to discipline teachers because of political speech. Instead, the speech at issue here countervails the State's moral standards, as defined in its criminal code giving the state a special interest in the effect the speech has on its public school students.

A homosexual teacher may indeed engage in political speech that by advocates the repeal of laws against homosexuality. However, the purpose of the statute is not to keep the teacher from engaging in political speech but to keep the teacher

out of the classroom where that speech creates a serious question of his fitness to teach.

If the courts agree with the premise that the public schools, acting in the stead of the parents, have a legitimate interest in promoting in its public school children the moral code of the community, then it follows that the state may also take action against its teachers where the teachers' speech, which would otherwise be protected, substantially interferes with that public interest.

The disruption standard also poses difficult problems in application because the instant case does not concern "disruption" in the usual sense of causing a physical disturbance, but "disruption" in the sense of seriously disturbing students

in the complex process of maturation.

A class of sixth graders, entering adolescence and troubled by their own developing sexuality may be significantly disrupted by the presence of a homosexual teacher who has recently expressed his or her views on the subject in a number of local newspapers. As a result the teacher may be unable to perform the daily duties expected of teachers.

Free Speech Rights of Homosexual Teachers Columbia Law Review 1524 (1980).

It is truly a "balancing" of the right of teachers as citizens to state their views and even to advocate homosexuality, and the state's interest in assuring that the public comments of such teachers, who are role models in the classrooms in which the children are required by law to be present, do not confuse and disturb the children in his charge. Although under most circumstances the first amendment free

speech protection is of the highest order, the state's duty to protect its children is higher.

Realistically, it may be difficult indeed to show that public statements on this subject render a teacher unfit. And certainly the State would be required to meet all Due Process procedures before taking any action against such employees. However, the issue here is not the quantum of proof but whether, once proved, the State can act.

We must accept the fact that a legitimate goal of the schools is to give children the "utmost opportunity to be essentially normal in this important phase of life." Acanfora v. Board of Education of Montgomery County, 359 F. Supp. 843, 847 (1973).

As noted above, the behavioral sciences cannot provide absolutes relating to cause and effect of homosexuality. However, there is evidence to the effect that a known homosexual teacher may serve as a model to a young child with bisexual tendencies and his or her removal from the classroom would result in a freer choice for the child. Acanfcra, 259 F.Supp. at 847.

Although it can be argued that homosexuality is a status over which homosexuals have little control, nevertheless courts have uniformly upheld statutes outlawing sodomy, even between consenting adults, the act being almost universally considered "immoral" in this society. See, eg, Doe v. Commonwealth's Attorney, supra.

We must emphasize that we do not advocate here a "pall of orthodoxy" in the public schools. Board of Education, Island Trees Union Free School District No. 26 v. Pico, 102 S. Ct. 2799 (1982). Whatever the feelings of the community about homosexuals and homosexuality, the school board should not have the right to treat such persons any differently than they do other employees unless their conduct, as a result of their homosexuality, seriously impairs their ability to act as teachers. There the moral code of the community is legally relevant.

The statute at issue here is very careful to specify the matters which must be taken into account before adverse action can be taken. There are education codes which go so far as to authorize termination

of teachers solely because they are homosexual or because they advocate homosexuality. Sex Litigation and the Public Schools, supra at page 41.

However, that is not true of the statute here. There must be a relationship between the speech and some adverse effect on the students. The statute lays out four factors to be considered in determining whether a teacher has been rendered unfit because of public homosexual conduct or activity:

- o The likelihood that the activity or conduct may adversely affect students or school employees. This would likely require expert testimony or, at the least, direct evidence of harm.
- o The proximity in time or place of the activity or conduct to the teacher's...official duties. If a teacher in Illinois makes a speech at a convention in New York, the school board is

unlikely to sustain its argument that it affected students in any way. If the teacher wrote a little-known article when he was in college, that event is probably too remote to affect his students now. However, if the teacher speaks at a widely publicized rally in the small community in which he teaches, that may very well be shown to affect the students.

- o Any extenuating or aggravating circumstances. That would include matters such as the age of the children in the teacher's class; the relative "liberality" of the community eg the statements may have less of an adverse effect where the community has taken steps to educate children on such matters; the sensitivity of the teacher in dealing with his homosexuality.
- o Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity. This, together with the age of the students, is the most important factor to be considered. It may be difficult, if not impossible, to prove but it would seem to be a controlling

factor if proved.

CONCLUSION

The question of dismissal, or other adverse treatment, of public school teachers because of their immorality (whether based on illegal activities or merely those which are immoral based on general community standards) is a difficult one.

However, elementary and secondary age children are required by the law of every state to either attend public schools or pay for their education in a private school. Given these constraints, school districts must adhere to the moral standards of the community, even to the extent of limiting the rights of those who teach in the schools.

We are not dealing with college students with sufficient maturity to handle discrepancies between the moral teachings of their parents and those of their teachers.

Although this type of activity might better be regulated by local officials, on a case-by-case basis, the criteria set forth in the statute at issue here are the same criteria which a local school board should use in determining whether the speech of a teacher adversely affects the students in the teacher's classroom.

Amicus urges the Court to either uphold the statute, on its face, or at the least to affirm that school boards have the constitutional authority to use similar criteria to that in the statute to determine the suitability of teachers; ie,

the fitness of teachers to teach may be determined by the nature of their spoken statements outside the classroom.

Respectfully submitted,

GWENDOLYN H. GREGORY
NSBA Deputy Legal
Counsel
Counsel of Record

1680 Duke Street
Alexandria, VA.
(703) 838-6712

AUGUST W. STEINHILBER
NSBA Associate
Executive Director/
Legal Counsel

THOMAS A. SHANNON
NSBA Executive
Director

upheld restrictions upon advocacy even against non-public employees when "fighting words" were likely to interfere with the orderly function of the society generally. Terminiello v. Chicago, 337 U.S. 1 (1949). See also Feiner v. New York, 340 U.S. 315 (1951); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

If Oklahoma cannot remove teachers from the public schools who advocate disobedience of criminal laws with regard to sexual activity, it could not remove teachers who advocate other forms of unlawful conduct, such as violation of society's laws against the use or distribution of narcotics.

In Connick v. Myers, *supra*, this Court upheld dismissal of an assistant district attorney who circulated a memo which the Court found had a potential

for "undermining office relations." 461 U.S. at 152. The State asserts that it should also be found that a teacher who advocates homosexual activity outside the classroom may also undermine the delicate relationship between student and teacher and may cause dissention among the students themselves.

CONCLUSION

For the reasons stated, it is respectfully requested that the Judgment the United States Court of Appeals for the Tenth Circuit be reversed and that the constitutionality of the Oklahoma

statute in question, Okla. Stat. Ann.
tit. 70, § 6-103.15 be upheld.

Respectfully submitted,

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

DAVID W. LEE
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL AND FEDERAL
DIVISIONS
112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR APPELLANT

November, 1984

10
No. 83-2030

Supreme Court, U.S.
FILED

DEC. 17 1984

ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THE BOARD OF EDUCATION OF THE CITY OF OKLAHOMA,
STATE OF OKLAHOMA,
v. *Appellant,*
THE NATIONAL GAY TASK FORCE,
Appellee.

On Appeal from the United States Court of Appeals
for the Tenth Circuit

**BRIEF OF THE
NATIONAL EDUCATION ASSOCIATION
AND THE AMERICAN JEWISH CONGRESS
AS AMICI CURIAE IN SUPPORT OF APPELLEE**

ROBERT CHANIN
(Counsel of Record)

ROBERT M. WEINBERG
DAVID M. SILBERMAN
BREDHOFF & KAISER
Suite 1300
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
*Attorneys for Amici Curiae
National Education Association
and American Jewish Congress*

25

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
A. The Power of the State to Restrict Speech Out- side of the Employment Context	7
B. The Power of the State to Restrict Non- Classroom Speech by Public School Teachers....	8
C. The Oklahoma Statute	14
CONCLUSION	21

TABLE OF AUTHORITIES

	Page
<i>Ambach v. Norwick</i> , 441 U.S. 68 (1979)	<i>passim</i>
<i>Arnett v. Kennedy</i> , 416 U.S. 134 (1974)	17-18
<i>Baggett v. Bullitt</i> , 377 U.S. 360 (1964)	16-17, 19
<i>Board of Education v. Pico</i> , 457 U.S. 853 (1982) ..	9, 14
<i>Bob Jones University v. United States</i> , — U.S. —, 51 U.S.L.W. 4593 (May 24, 1983)	11
<i>Bolger v. Youngs Drug Products Corp.</i> , — U.S. —, 51 L.W. 4961 (June 24, 1983)	8
<i>Bose Corp. v. Consumers Union</i> , — U.S. —, 52 L.W. 4513 (April 30, 1984)	9
<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1967)	7
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954)	9
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	12, 14
<i>Butler v. Michigan</i> , 352 U.S. 380 (1957)	8
<i>Carey v. Population Services International</i> , 431 U.S. 678 (1977)	8
<i>Connick v. Meyers</i> , 461 U.S. 138 (1983)	6, 9
<i>Consolidated Edison Co. v. Public Service Commis- sion</i> , 447 U.S. 530 (1980)	3, 12
<i>Cramp v. Board of Education</i> , 368 U.S. 278 (1961)	16
<i>Erznoznik v. City of Jacksonville</i> , 422 U.S. 205 (1975)	17
<i>First National Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978)	12
<i>Givhan v. Western Line Consolidated School Dist.</i> , 439 U.S. 410 (1979)	9
<i>Gooding v. Wilson</i> , 405 U.S. 518 (1972)	3, 14
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972) ..	14
<i>Healy v. James</i> , 408 U.S. 169 (1972)	7
<i>Hess v. Indiana</i> , 414 U.S. 105 (1973)	8
<i>Hynes v. Mayor of Oradell</i> , 425 U.S. 610 (1976) ..	3, 14
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923)	11
<i>NAACP v. Button</i> , 371 U.S. 415 (1963)	3, 14
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982)	7-8
<i>Niemotko v. Maryland</i> , 340 U.S. 268 (1951)	13-14

TABLE OF AUTHORITIES—Continued

	Page
<i>Pickering v. Board of Education</i> , 391 U.S. 563 (1968)	<i>passim</i>
<i>Pinkus v. United States</i> , 436 U.S. 293 (1978)	8
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982)	9
<i>Procunier v. Martinez</i> , 416 U.S. 396 (1974)	19
<i>Tinker v. Des Moines School Dist.</i> , 393 U.S. 503 (1969)	11
<i>University of California Regents v. Bakke</i> , 438 U.S. 265 (1978)	12
<i>Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.</i> , 455 U.S. 489 (1982)	4, 17
<i>West Virginia Board of Education v. Barnette</i> , 319 U.S. 624 (1943)	<i>passim</i>
<i>Whitney v. California</i> , 274 U.S. 357 (1927)	7
<i>Wieman v. Updegraff</i> , 344 U.S. 183 (1952)	13
70 Okla. Stat. § 6-103.15	<i>passim</i>

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2030

THE BOARD OF EDUCATION OF THE CITY OF OKLAHOMA,
STATE OF OKLAHOMA,

v. *Appellant,*

THE NATIONAL GAY TASK FORCE,
Appellee.

On Appeal from the United States Court of Appeals
for the Tenth Circuit

**BRIEF OF THE
NATIONAL EDUCATION ASSOCIATION
AND THE AMERICAN JEWISH CONGRESS
AS AMICI CURIAE IN SUPPORT OF APPELLEE**

The National Education Association and the American Jewish Congress file this brief *amici curiae* with the consent of the parties.

INTEREST OF THE AMICI CURIAE

The National Education Association is a nationwide employee organization with some 1.7 million members, the vast majority of whom are employed by public school districts. One of the principal purposes of the Association is to protect the constitutional rights of its mem-

bers, including their right, as citizens, to speak on matters of public concern.

The American Jewish Congress is a membership organization of American Jews. Some of its members are public school teachers, and all of its members hold a deep and abiding commitment to preserving the freedoms secured by the First Amendment.

SUMMARY OF ARGUMENT

The statute at issue here restricts the right of teachers, student teachers and teachers' aides employed in the Oklahoma public schools to make out-of-class statements on matters of public concern—specifically, any statement “advocating, . . . encouraging or promoting” homosexual activity can subject these individuals to the loss of employment.

Although the Oklahoma statute would, outside of the employment context, be unconstitutional in all or virtually all of its applications (Part A), a more complex analysis is called for when the state seeks to regulate the speech of its own employees. Under *Pickering v. Board of Education*, 391 U.S. 563 (1968), and its progeny, the task is to balance the state's interest—here, the interest in inculcating fundamental values in school children—against the right of the teachers, student teachers and teacher aides, as citizens, to speak on matters of public concern. Only if this balance favors the state can the challenged statute be sustained.

The state's inculcative interest is implicated most directly by what is said or done in the classroom. But because a teacher serves as a role model for students, the state also may “take account” of out-of-class speech in making employment decisions. *Ambach v. Norwick*, 441 U.S. 68, 78 (1979). This does not mean, however, that the state may exclude from the classroom any individual who has engaged in speech which, in the state's view,

makes that individual an “undesirable” role model for students. Such a rule would be inconsistent with the First Amendment in two respects.

First, the state's interest in inculcating students is limited by the First Amendment to inculcating those fundamental “values on which our society rests,” *Ambach v. Norwick*, *supra*, 441 U.S. at 76; the state may not constitutionally “prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion,” *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Even in regard to those subjects that may be appropriate for inculcation, the state's interest is not implicated unless the speech in question constitutes a substantial and square challenge to the value that the state seeks to inculcate.

Second, quite apart from placing this critical limitation on the state's interest in inculcation, the First Amendment also secure to *all* citizens—including teachers—“the liberty to discuss publicly and truthfully all matters of public concern.” *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 534 (1980). A rule which automatically excluded an individual from teaching because he or she chose, outside of the classroom, to exercise this right could not be squared with the First Amendment.

Because of the importance of the First Amendment interests involved, it is essential that when the state attempts to regulate a teacher's out-of-class speech it does so “only with narrow specificity,” *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976), quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963), so as not “unduly to infringe the protected freedom,” *Gooding v. Wilson*, 405 U.S. 518, 522 (1972). (Part B)

The challenged Oklahoma statute fails to pass muster under the foregoing principles. The statute reaches or well may reach a great deal of speech that is protected

by the First Amendment and that does not implicate any legitimate state interest: for example, statements that oppose laws criminalizing private homosexual activity between consenting adults, favor the enactment of laws prohibiting discrimination against homosexuals, or simply might tend to lessen the stigma that generally is attached to homosexuality in our society presumably can subject the speaker to the statutory penalties for "advocating, . . . encouraging, or promoting" homosexuality. Indeed, there is no speech on the subject of homosexuality—other than speech unremittingly hostile to homosexuals and homosexual rights—that a teacher (or a lawyer advising a teacher) could consider safely beyond the reach of the statute. Because that is so, the statute, taking into account both the "ambiguous as well as the unambiguous scope," *Village of Hoffman Estates v. Flipside Hoffman Estates*, 455 U.S. 489, 494 n.6 (1982), is substantially overbroad.

The overbreadth problem is compounded by the fact that the Oklahoma statute is not limited to speech that is likely to come to the attention of school children, but applies as well to speech that is likely to come to the attention of "school employees." Such speech does not implicate any conceivable inculcative interest of the state. This likewise is true with respect to the application of the statute to out-of-class speech by teachers' aides, who do not serve as significant role models for school children. And, it is also true, in the main, of statements made before entering the teaching profession—statements which can trigger the Oklahoma statute. Certainly the only prudent course for anyone contemplating a career in the Oklahoma public schools would be to avoid at any time making any statements on the subject of homosexuality or the rights of homosexuals. (Part C(1)).

Finally, the portion of the Oklahoma statute that provides that a teacher may not be denied employment unless it has been determined that he or she has been "ren-

dered unfit" because of the speech in question cannot save the statute from invalidation. The factors that the statute indicates are to be considered in making the unfitness determination are so vague and general that it is impossible to predict in advance how the unfitness issue will be resolved in any particular case; thus the unfitness provision does not in any way diminish the chilling effect of the law. Moreover, only two of the listed factors are even arguably related to the state's inculcative interest, and these factors are not even prerequisites to a determination of unfitness. (Part C (2))

ARGUMENT

Although this case was decided in the court below on the basis of narrow, well-established constitutional principles, and should, we believe, be decided on the basis of the same principles in this Court, there are in the background broader and far more difficult issues. It is appropriate at the outset, therefore, to make clear what is—and is not—before this Court.

To begin with, this case does not concern the power of the state to regulate sexual *activity*. The only portion of the challenged Oklahoma statute which deals with such activity (70 Okla. Stat. § 6-103.15(A)(1)) was sustained by the lower court, and no party has sought review of that holding here. Nor does this case concern the power of the state to prescribe what is taught, or more broadly what is said, *in public school classrooms*. The Oklahoma statute is not limited to classroom speech, but is directed to any speech which poses a "substantial risk" that it "will come to the attention of school children or school employees." *Id.* § 6-103.15(A)(2). This means that, whatever the state's power to regulate classroom speech, that power cannot be relied upon to defend the challenged statute.

What is at issue here, then, is the power of the state to regulate *out-of-classroom* speech by teachers, student teach-

ers and teachers' aides (hereinafter generally referred to as "teachers"), and, correlatively, the First Amendment right of these individuals to speak on matters of public concern.¹ Neither appellant nor the State of Oklahoma, as *amicus curiae*, disagree with the lower court's conclusion that the portion of the Oklahoma statute that was struck down (70 Okla. Stat. § 6-103.15(A)(2), hereinafter "Oklahoma Statute") reaches statements pertaining to the subject of homosexuality "which are aimed at legal and social change," 729 F.2d at 1274; indeed, the Oklahoma Attorney General forthrightly acknowledges that the statute applies to "advocate[s] of social causes," Okla. Br. at 20, and thus may be used "to remove 'gay rights' activists from teaching," *id.* at 22.² The lower court held the Oklahoma statute unconstitutionally overbroad precisely because of its coverage of such speech. Appellant and Oklahoma argue, however, that this holding is contrary to *Pickering v. Board of Education*, 391 U.S. 563 (1968), under which, they assert, the state may make any statement by a teacher pertaining to homosexuality a ground for dismissal. Thus, the dispute here as to the overbreadth *vel non* of the Oklahoma statute involves the proper application of *Pickering* in a setting quite different from the one that was presented by that case. It is to that dispute that this brief is addressed.

¹ There is no question but that the Oklahoma statute applies principally, if not exclusively, to speech by a teacher "as a citizen upon matters of public concern," as opposed to speech by a teacher "as an employee upon matters only of personal interest." *Connick v. Myers*, 461 U.S. 138, 147 (1983). Accordingly, the speech is not unprotected under *Connick*.

² Appellant and Oklahoma emphasize the fact that, although the statute can be *triggered* by speech of the type described in text, a teacher can be denied employment only if it is determined that "because of" the speech he or she "has been rendered unfit" to teach. 70 Okla. Stat. § 6-103.15(B)(2), (C). We discuss the significance of this provision of the Oklahoma statute *infra*, at pp. 19-21

A. The Power of the State to Restrict Speech Outside of the Employment Context

Pickering recognized in the employment context an exception to the constitutional principles that otherwise would apply to state action restricting speech, and it is helpful by way of background to reiterate what those principles are. Outside of the employment context, "[t]he critical line heretofore drawn for determining the permissibility of regulation [based on the ideas expressed by the speaker] is the line between mere advocacy and advocacy 'directed to inciting or producing imminent lawless action.'" *Healy v. James*, 408 U.S. 169, 188 (1972), quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1967) (*per curiam*). That line first was laid down by Justice Brandeis in *Whitney v. California*, 274 U.S. 357 (1927), where he wrote, "even advocacy of violation [of law], however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on." 274 U.S. at 376 (concurring opinion; emphasis added).³ See also to the same effect, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) ("mere advocacy of the use of force or violence does not remove speech from the

³ Justice Brandeis elaborated:

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incident of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. [274 U.S. at 377.]

protection of the First Amendment"); *Carey v. Population Services International*, 431 U.S. 441, 448 (1974); *Hess v. Indiana*, 414 U.S. 105 (1973).

Given the above line, it is clear that, outside of the employment context, the Oklahoma statute would be unconstitutional in all or virtually all of its conceivable applications. Simply stated, the lesson of the cited cases is that under the First Amendment citizens have a right to advocate homosexual activity even where such activity is unlawful, so long as the speaker is not "inciting or producing imminent lawless activity."

Nor would the state's regulatory power be any greater, still outside the employment context, with respect to particular statements directed at *adults* but likely to "come to the attention of school children." This Court repeatedly has rejected the proposition that the First Amendment permits the state to "reduce the adult population . . . to [hearing] only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). "The level of discourse reaching the mailbox simply cannot be limited to that which would be suitable for a sandbox." *Bolger v. Youngs Drug Products Corp.*, — U.S. —, 51 U.S.L.W. 4961, 4965 (June 24, 1983). See also *Pinckus v. United States*, 436 U.S. 293, 298 (1978).

In sum, divorced from the employment context, there is no doubt that the speech to which the Oklahoma statute is addressed would be fully protected by the First Amendment.

B. The Power of the State to Restrict Non-Classroom Speech by Public School Teachers

Because this case arises in the employment context, a more complex analysis is necessary. "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citi-

zenry in general." *Pickering, supra*, 391 U.S. at 568. "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* When that balance favors the state, and only then, "employment-related sanctions may be imposed on the basis of such statements." *Bose Corp. v. Consumers Union*, — U.S. —, 52 U.S.L.W. 4513, 4518 n.22 (April 30, 1984).

Pickering and its progeny involved speech by a public employee "critical of his ultimate employer," *Pickering, supra*, 391 U.S. at 572, and the interest asserted by the state, as employer, was an interest in "orderly school administration," *id.* at 569—that is, in maintaining "discipline," "harmony among co-workers," and "close working relationships," *id.*; see *Connick v. Myers, supra*, 461 U.S. at 150-154; *Givhan v. Western Line Consolidated School Dist.*, 439 U.S.C. 410, 414 & n.3 (1979) (*dictum*). In this case, a very different state interest has been invoked in an effort to justify the Oklahoma statute: an interest in inculcating in school children "the basic morals and values of society," Okla. Br. at 7. The issue, then, is how this asserted state interest is to be accommodated with "the interest of the teacher, as a citizen, in commenting upon matters of public concern." *Pickering, supra*, 391 U.S. at 568.

There is no doubt that "education has a fundamental role in maintaining the fabric of our society," *Plyler v. Doe*, 457 U.S. 202, 221 (1982), and because of this, the state has an interest in inculcating in students the "values on which our society rests," *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). See also, e.g., *Board of Education v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). That state interest is most directly implicated

by what a teacher says and does in the classroom, where the inculcation is supposed to occur. But because "a teacher serves as a role model for his students, exerting a subtle but important influence over the perceptions and values," *Ambach v. Norwick*, *supra*, 441 U.S. at 78, even out-of-class speech may, under certain limited circumstances, implicate the state's inculcative interest. Accordingly, the state, in making employment decisions, "may take account of a teacher's function as an example for students, which exists independently of particular classroom subjects." *Id.* at 80.

But to acknowledge that the state may "take account of a teacher's function as an example for students," does not mean, as appellant and its supporting *amici curiae* seem to contend, that the state has absolute and unlimited power to exclude from the classroom any individual who has engaged in speech which, in the state's view, makes that individual an "undesirable" role model for students. The inexorable consequence of this position would be that no teacher could publicly address any subject of public concern without fear of discharge; that consequence is made explicit by the Oklahoma Attorney General in his *amicus* brief, when he urges a rule pursuant to which a state could "require that a public school teacher remain neutral with regard to public advocacy of issues which are controversial" Okla. Br. at 3-4. See also *id.* at 20. As we demonstrate below, any such rule would flout the values underlying the First Amendment in two respects.

1. The First Amendment limits the matters as to which state inculcation is proper. Under that Amendment, the state may not constitutionally "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). "In

Meyer v. Nebraska, [262 U.S. 390, 402 (1932)], Mr. Justice McReynolds expressed this Nation's repudiation of the principle that a State might so conduct its schools as to 'foster a homogenous people.' " *Tinker v. Des Moines School Dist.*, 393 U.S. 502, 511 (1969). And as Justice Jackson observed in *Barnette*, *supra*, "[p]robably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing." 319 U.S. at 641.

Accordingly, while the state may seek to inculcate in students those fundamental "values on which our society rests," *Ambach v. Norwick*, *supra*, 441 U.S. at 76, the state may not inculcate a particular view—i.e., "prescribe what shall be orthodox," *Board of Education v. Barnette*, *supra*, 319 U.S. at 42—on such matters as abortion, the nuclear freeze, capital punishment, and the like. And because the state may not constitutionally present to students, as "right," one side of these and other issues of public concern in classroom discussion, it follows *a fortiori* that the state may not exclude someone from teaching because he or she, outside the classroom, publicly takes the "wrong" stand on such matters, i.e., a stand with which state officers disagree.

Moreover, even in regard to a value as to which inculcation is permissible, a sharp distinction must be drawn between statements by a teacher that constitute a square attack or repudiation of that value and statements concerning a public issue which issue, in the state's view, is related to that value. Only the former type of statements threaten the state's ability to inculcate fundamental values and thus only statements of that type are of legitimate concern to the state. The point is best made by an illustration. Because of the firm "public policy against racial discrimination," *Bob Jones University v. United States*, — U.S.—, 51 U.S.L.W. 4593, 4599 (May 24, 1983), we assume that the state may attempt to inculcate

in students a belief in non-discrimination. Clearly, the state's interest in inculcating that value would be implicated if a teacher, outside of the classroom, publicly championed white supremacy or racial segregation. But the state interest would not in any way be jeopardized by a teacher who, again outside of the classroom, opposed affirmative action. No matter how deeply a particular school board believed that "[i]n order to get beyond racism, we must first take account of race," *University of California Regents v. Bakke*, 438 U.S. 265, 407 (1978) (opinion of Blackmun, J.), it would be impermissible for that board, in the guise of fostering a belief in nondiscrimination, to deny a teaching position to someone because he or she is an opponent of affirmative action.

2. Quite apart from placing this critical limitation on the state's interest in inculcation, the First Amendment also secures to all citizens—including those who choose to become teachers—"the liberty to discuss publicly and truthfully all matters of public concern," *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 534 (1980). That liberty is protected both as an end in itself and also as a means "to secure 'the widest possible dissemination of information from diverse and antagonistic sources'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley v. Valeo*, 424 U.S. 1, 49 (1976). Consequently, under the First Amendment "speech concerning public affairs is more than self-expression; it is the essence of self-government." And self-government suffers when those in power suppress competing ideas on public issues "from diverse and antagonistic sources." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.12 (1978) (citations omitted). Thus, to exclude an individual from teaching because he or she, outside of the classroom, does not "remain neutral with regard to public advocacy of issues which are controversial. . . .," Okla. Br. at 3-4, or is "an advocate of

social causes," *id.* at 20, would strike at the very heart of the First Amendment.

Indeed, given the values underlying the First Amendment, teachers are the last group to whom the right of self-expression on matters of public concern should be denied. For, as Justice Frankfurter explained:

[I]n our entire educational system, from the primary grades to the universities . . . [i]t is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens who, in turn, make possible an enlightened and effective public opinion. *Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of openmindedness and free inquiry. They cannot carry out their noble tasks if the condition for the practice of a responsible and critical mind are denied them.* [*Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring) (emphasis added).]

The short of the matter is simply this: "inculcation" is not a talisman whose invocation automatically and inevitably overrides the interest of teachers in self-expression outside of the classroom. When the state's inculcative interest is asserted to justify an employment sanction, it is necessary first to determine whether the state interest is a legitimate one—i.e., whether the state is seeking to inculcate a fundamental value rather than attempting to prescribe orthodoxy on a matter of public concern. And if the state interest is legitimate, it then becomes necessary to balance carefully that interest against the teacher's interest in being free to make the particular statement that is claimed to interfere with the state's ability to inculcate the particular value.

In the latter regard, the problem posed for this Court is nothing new: "[a]djustment of the inevitable conflict

between free speech and other interests is a problem as persistent as it is perplexing." *Niemotko v. Maryland*, 340 U.S. 268, 275 (1951) (Frankfurter, J., concurring). And as Justice Blackmun has noted in an analogous context, that adjustment is best accomplished by a "delicate accommodation" of the competing interests, rather than by "choosing one principle over another." *Board of Education v. Pico*, *supra*, 457 U.S. at 882 (concurring opinion).

Because of this concern for the competing interests involved, it is essential that any state regulation of a teacher's out-of-class speech "not, in attaining a permissible end, unduly . . . infringe the protected freedom." *Gooding v. Wilson*, 405 U.S. 518, 522 (1972). In concrete terms, this means that the state may regulate "only with narrow specificity," *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976), quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963), for as this Court often has recognized, "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Thus, to provide First Amendment freedoms the "breathing space" they need to survive, "[t]he test is whether the language of [a particular statute] affords the 'precision of regulation [that] must be the touchstone in an area so closely touching our most precious freedom.'" *Buckley v. Valeo*, *supra*, 424 at 41.

C. The Oklahoma Statute

Measured against the foregoing principles, the Oklahoma statute is unconstitutional on its face. For as we proceed to show, this is not a statute drawn with "narrow specificity" so as not "unduly to infringe the protected freedom." Rather, the Oklahoma statute in several respects encompasses within its reach a great deal of constitutionally protected speech which is of no legiti-

mate concern to the state, and the statute is drafted in such vague terms as "inevitably to lead those to whom it applies to 'steer . . . wide[] of the unlawful zone.'" "

1. To begin with, the Oklahoma statute applies not only to "soliciting [or] imposing" homosexual activity, but also to any statements that "advocat[e], . . . encourag[e] or promot[e]" such activity. 70 Okla. Stat. § 6-103.15(A)(2). As the court below demonstrated—and as the Oklahoma General freely acknowledges, *see* p. 6, *supra*—the statute thus reaches or well may reach statements on issues of clear public concern: for example, statements opposing laws that criminalize private homosexual acts between consenting adults or statements favoring the enactment of laws that prohibit discrimination against homosexuals.⁴ Yet such statements do not jeopardize the state's ability to inculcate any fundamental value.

Moreover, because the terms "advocate, encourage or promote" are so broad, there is *no* speech on the subject of homosexuality—other than speech unremittingly hostile to homosexuals and homosexual rights—that can be considered safely beyond the reach of the Oklahoma law. A teacher who sought legal counsel as to what speech is permissible under the statute would have to be told by any lawyer concerned about protecting that teacher's interests that it is impossible to know how far the statute extends; that virtually any speech on the subject of homosexuality or the rights of homosexuals could be deemed to

⁴ It is noteworthy in this regard that although appellant suggests that the lower courts should have abstained from deciding this case, the only unsettled issue of state law that appellant believes should have been certified to the Oklahoma Supreme Court pertains to the unfitness requirement, *see* p. 20, *infra*, and *not* to the meaning of "advocating . . . encouraging, or promoting" homosexual activity. *See* Appellant Br. at 13-18.

"encourage" or "promote" homosexual activity and thereby trigger the law; and that the only prudent course is to avoid speaking on such subjects altogether.

In this regard, the instant case closely parallels *Cramp v. Board of Education*, 368 U.S. 278 (1961) and *Baggett v. Bullitt*, 377 U.S. 360 (1964). Those cases involved loyalty oaths that were required of teachers: in *Cramp* an oath that the teacher had never "knowingly lent [his] aid, support, advice, counsel or influence to the Communist Party," 368 U.S. at 285, and in *Baggett* an oath that the teacher "will by precept and example promote respect for the flag and institutions of the United States," 377 U.S. at 362. In both cases, this Court—without questioning the legitimacy of the state's interest in inculcating loyalty, patriotism and the like in students—held the oaths to be unconstitutionally vague. Writing for this Court in *Baggett*, Justice White stated:

We are dealing with indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic First Amendment freedoms. The uncertain meanings of the oaths require the oath-taker . . . to "steer far wider of the unlawful zone" than if the boundaries of the forbidden areas were clearly marked. Those with a conscientious regard for what they solemnly swear or affirm, sensitive to the perils posed by the oath's indefinite language, avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited.

* * *

It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted for knowing but

guiltless behavior nevertheless remains Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law. [377 U.S. at 372, 373.]

The *Baggett* Court's comments are equally applicable here. The Oklahoma statute applies or may well apply to a great deal of speech which does not threaten any legitimate state interest, but which does fall within the core protection of the First Amendment. And because of its breadth, the statute has a "deterrent effect on legitimate expression [that] is both real and substantial," *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 206 (1975), requiring teachers to steer clear of all discussion of homosexuality and homosexual rights in order to be "unquestionably safe," *Baggett, supra*, 377 U.S. at 372. "Free speech may not be so inhibited." *Id.* Thus, taking into account both the "ambiguous as well as the unambiguous scope of the enactment," *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.6 (1982), the conclusion is inescapable that the Oklahoma statute is substantially overbroad in violation of the First Amendment.⁵

⁵ This conclusion is not inconsistent with *Arnett v. Kennedy*, 416 U.S. 134 (1974), in which this Court sustained as not unduly vague or overbroad a federal statute authorizing dismissal of federal employees "for such cause as will promote the efficiency of the service." The statute at issue in *Arnett* was different from the Oklahoma statute in several critical respects. To begin with, the *Arnett* statute was designed "to give myriad different federal employees performing widely disparate tasks a common standard of job protection," *id.* at 159, and, as this Court observed, there "are limitations in the English language with respect to being both specific and manageably brief," *id.* Moreover, the language of the *Arnett* statute had been subject to limiting and clarifying interpretations by the Civil Service Commission, *id.* at 160, and, because it is a federal statute, this Court itself was able to authoritatively construe the law to "exclude[] constitutionally-protected speech," *id.* at 162. Finally, there was a procedure available under the federal statute to provide "counsel [to] employees who seek advice on the interpretation of the Act and its regulations." *Id.* at 160.

The Oklahoma legislature, in contrast, was not here attempting to set forth a "broad and general removal standard," *id.* at 161, and

The overbreadth problem that inheres in the words "advocating, . . . encouraging or promoting" is compounded by the fact that, contrary to many of the statements in the briefs on the other side, the statute is *not* limited to speech that is likely to come to the attention of school children. The statute applies to speech as to which there is a "substantial risk" that it "will come to the attention of school children or school employees." 70 Okla Stat. § 6-103.15(A)(2) (emphasis added). Thus, the statute, in terms, applies to private conversations among school employees; statements made at faculty meetings, union meetings, or other gatherings at which a "school employee" may be present; and even statements made outside the presence of any school employee where there is a "substantial risk" that the statements will be reported to one or more such employees. It is irrelevant for these applications whether any school children are likely to hear the speech in question; this means that the statute reaches to a significant degree speech which, by definition, does not implicate any conceivable inculcative interest of the state.

A similar problem exists *vis-a-vis* the application of the Oklahoma statute to out-of-class speech by a teachers' aide (regardless of whether such speech is likely to come to the attention of school children). Since it is doubtful that such individuals serve as significant role models, the state's inculcative interest is likewise irrelevant to this aspect of the prohibition.

Finally, because the Oklahoma statute permits a school board to "refuse[] employment or reemployment" to one

thus greater specificity was possible *vis-a-vis* the nature of the proscribed speech. Furthermore, the Oklahoma law *was* "written upon a clean slate," and it "appear[s] as a clean slate now," *id.* at 160, without any limiting or clarifying construction. And there is no procedure available under the Oklahoma statute to "counsel employees who seek advice on the interpretation of the Act." *Id.* In short, the holding in *Arnett* does not provide any basis for sustaining the constitutionality of the Oklahoma statute.

who has made a statement covered by the statute, *id.* § 6-103.15(B), it necessarily applies to statements made by an individual before he or she became a teacher or aide—no matter how long ago the statements were made. Although most such statements would not jeopardize the state's inculcative interest, anyone contemplating a career in the Oklahoma public schools would, to be safe, avoid making any public statement that could later trigger the statute.

In sum, regardless of whether heterosexuality is the type of fundamental value that the state constitutionally may seek to inculcate in students, the state's inculcative interest cannot suffice to establish the constitutionality of the Oklahoma statute. It is substantially overbroad in violation of the First Amendment.⁶

2. We recognize, of course, that before a teacher may be denied employment under the Oklahoma statute a determination must be made that he or she has been "rendered unfit because of [the speech in question]," 70 Okla. Stat. § 6-103.15(B)(2), and that the statute lists four factors which "will be considered in making the [unfitness] determination." *Id.*, § 6-103.15(C).⁷ But this

⁶ In our view, "no single adjudication by a state court could eliminate the constitutional difficult[ies]" described in text; "[r]ather it would require 'extensive adjudications, within the impact of a variety of factual situations,' to bring the challenged statute . . . 'within the bounds of permissible constitutional certainty.'" *Procunier v. Martinez*, 416 U.S. 396, 401 n. 5 (1970), quoting *Baggett v. Bullitt*, *supra*, 377 U.S. at 378. Accordingly, we believe the lower courts did not err in declining to abstain.

⁷ These factors are:

- "1. The likelihood that the activity or conduct may adversely affect students or school employees;
2. The proximity in time or place of the activity or conduct to the teacher's, student teacher's or teacher's aide's official duties;

[Continued]

provision does not save the statute from its unconstitutional overbreadth.

The factors listed in the statute are so vague and general that it is impossible to predict in advance how the unfitness issue will be resolved in any particular case. Thus, no teacher or prospective teacher desiring to speak on the subject of homosexuality can feel safe in the knowledge that an unfitness determination is required by the statute, for there always will be a risk that a particular statement will be deemed to render the individual unfit. Accordingly, the chilling effect of the statute remains.

In addition, only two of the listed factors—i.e., factors 1 and 4—are even arguably related to the state's interest in inculcating fundamental values in students, and a finding that the speech in question meets the standards set forth in those factors is *not* a prerequisite to a determination of unfitness.⁸ An individual could be excluded from the classroom absent any finding that his or her statements are likely to "adversely affect students . . ." (factor 1) or "encourage or dispose school children toward

⁷ [Continued]

3. Any extenuating or aggravating circumstances; and
4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity."

⁸ Furthermore, these factors are not narrowly tailored to further the state's inculcative interest. Under the first factor a teacher's statements can be deemed to render the teacher unfit if there is a likelihood that the statement "may adversely affect students or school employees"; because the factor is in the disjunctive (and because the statute reaches speech that is likely to come to the attention of school employees but not children, *see* p. 18, *supra*), it is clear that even under this factor unfitness can be found absent any adverse effect on students. Similarly, under the fourth factor it is enough to find that a teacher's "conduct"—which is defined to mean his speech—"tends to encourage or dispose school children toward similar conduct," i.e., toward making similar statements.

similar . . . activity" (factor 4) based upon a finding that some *other* factor listed in the statute is present, or based upon a finding that there is an "adverse[] [e]ffect" on "school employees," or a tendency to "dispose children" to make similar statements, *see* n.7, *supra*.

In short, the unfitness provision does not cure the constitutional defects in the Oklahoma statute.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

ROBERT CHANIN
(Counsel of Record)

ROBERT M. WEINBERG

DAVID M. SILBERMAN

BREDHOFF & KAISER

Suite 1300

1000 Connecticut Avenue, N.W.

Washington, D.C. 20036

Attorneys for Amici Curiae

National Education Association

and American Jewish Congress

No. 83-2030

Supreme Court, U.S.
FILED

DEC 16 1984

IN THE

Supreme Court of the United States

October Term, 1984

LEONARD A. STEVENS
CLERK

THE BOARD OF EDUCATION OF THE CITY OF
OKLAHOMA CITY, OKLAHOMA,

Appellant,

v.

THE NATIONAL GAY TASK FORCE,

Appellee.

**On Appeal from the United States Court of Appeals
for the Tenth Circuit**

**AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL
OF THE STATE OF NEW YORK, JOINED
BY THE ATTORNEY GENERAL OF
THE STATE OF CALIFORNIA**

IN SUPPORT OF AFFIRMANCE

ROBERT ABRAMS
Attorney General of the
State of New York
AMICUS CURIAE
Suite 45-08
Two World Trade Center
New York, New York 10047
(212) 488-7511

ROBERT HERMANN
Solicitor General
Counsel of Record

ROSEMARIE RHODES
LAWRENCE S. KAHN
MARTHA J. OLSON
Assistant Attorneys General
Of Counsel

JOHN K. VAN DE KAMP
Attorney General of the
State of California
AMICUS CURIAE
6000 State Building
350 McAllister Street
San Francisco, California 94102
(415) 557-3991

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Interest of Amici Curiae	1
Statement of the Case	2
Summary of Argument	5
Argument	6
I. By punishing teachers who speak on the sub- ject of homosexuality, Oklahoma has exceeded its constitutional power to manage its schools and public employees.	6
A. The Statute Reaches Rights to Speech and Association Protected by the First Amend- ment.	8
B. The Statute's Nexus Requirements Do Not Satisfy the <i>Pickering</i> Balance Test Because They Fail to Require a Showing That the Speech Interferes With Professional Du- ties or Proper School Functioning.	13
C. The Statute Exerts an Unconstitutional Chilling Effect on the First Amendment Rights of Oklahoma School Teachers and Public Employees.	17
II. Oklahoma retains statutory authority to ter- minate or refuse to employ teachers whose speech interferes with the proper functioning of the schools without relying on this unconsti- tutional statute.	22
Conclusion	25

TABLE OF AUTHORITIES

	PAGE
Cases:	
Acanfora v. Board of Education, 491 F.2d 498 (4th Cir.), <i>cert. denied</i> , 419 U.S. 836 (1974)	20
Baggett v. Bullitt, 377 U.S. 360 (1964)	14, 18
Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982)	10
Board of Education v. Pico, 457 U.S. 853 (1982)	5, 6, 17, 21
Brandenburg v. Ohio, 395 U.S. 444 (1969)	4
Broadrick v. Oklahoma, 413 U.S. 601 (1973)	19, 21
Carey v. Population Services International, 431 U.S. 678 (1977)	10, 16, 21
Childers v. Independent School District, 645 P.2d 992 (Okla. 1981)	22
Childers v. Independent School District No. 1, 676 F.2d 1338 (10th Cir. 1982)	4
Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981)	11
Cohen v. California, 403 U.S. 15 (1971)	10, 15
Connick v. Myers, 461 U.S. 138 (1983)	7, 13, 20
Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980)	10, 25
Dombrowski v. Pfister, 380 U.S. 479 (1965)	18
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)	11, 18, 21
Gay Activists Alliance v. Board of Regents, 638 P.2d 1116 (Okla. 1981)	9
Ginsberg v. New York, 390 U.S. 629 (1968)	10, 11
Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979)	5, 7, 13, 14
Gooding v. Wilson, 405 U.S. 518 (1972)	9
Grayned v. City of Rockford, 408 U.S. 104 (1972)	9

	PAGE
Harris v. McCrae, 448 U.S. 297 (1980)	20
Healy v. James, 408 U.S. 169 (1972)	10, 11, 21
Jarvella v. Willoughby-Eastlake City School District, 12 Ohio Misc. 288, 233 N.E.2d 143 (1967)	23, 24
Jerry v. Board of Education, 35 N.Y.2d 534, 324 N.E.2d 106, 364 N.Y.S.2d 440 (1974)	23
Keyishian v. Board of Regents, 385 U.S. 589 (1967)	14, 18, 21
Members of the City Council v. Taxpayers for Vincent, — U.S. —, 80 L.Ed.2d 772 (1984)	21
Meyer v. Nebraska, 262 U.S. 390 (1923)	21
Morrison v. State Board of Education, 1 Cal.3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969)	23
Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977)	7
NAACP v. Alabama, 357 U.S. 449 (1958)	12
NAACP v. Buttons, 371 U.S. 415 (1963)	12
NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)	11, 12
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	20
People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980)	10
Perry v. Sindermann, 408 U.S. 593 (1972)	7
Pickering v. Board of Education, 391 U.S. 563 (1986)	5, 6, 7, 13, 20, 21
Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972)	10
Reinhardt v. Board of Education, 19 Ill.App.3d 481, 311 N.E.2d 710 (1974), <i>vacated on other grounds</i> , 61 Ill.2d 101, 329 N.E.2d 218 (1975)	23
Roberts v. United States Jaycees, — U.S. —, 104 S.Ct. 3244 (1984)	11
Roth v. United States, 354 U.S. 476 (1957)	11, 20

	PAGE
Shelton v. Tucker, 364 U.S. 479 (1960)	6
Shipley v. Salem School District, 64 Or.App. 777, 669 P.2d 1172 (1983)	23
Shurgin v. Ambach, 83 A.D.2d 665, 442 N.Y.S.2d 212 (3d Dept. 1981), <i>aff'd on other grounds</i> , 56 N.Y.2d 700, 436 N.E.2d 1324, 451 N.Y.S.2d 722 (1982)	24
Street v. New York, 394 U.S. 576 (1969)	10
 The National Gay Task Force v. Board of Education of the City of Oklahoma City, No. Civ-80-1174-E (W.D. Okla. June 29, 1982)	4, 8
The National Gay Task Force v. Board of Education of the City of Oklahoma City, 729 F.2d 1270 (10th Cir. 1984)	4, 10
Tinker v. Des Moines School District, 393 U.S. 503 (1969)	5, 16
 United States v. 37 Photographs, 402 U.S. 363 (1971) ..	9
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)	6
Wieman v. Updegraff, 344 U.S. 183 (1952)	6
Winslett v. Independent School District No. 16, 657 P.2d 1208 (Okla. App. 1982)	22
 Statutes:	
N.Y. Educ. Law § 3020	22
Okla. Stat. tit. 70, § 6-103	3, 6, 14, 16, 22, 24
Okla. Stat. tit. 70, § 6-103.9	24
Okla. Stat. tit. § 6-103.15	<i>passim</i>
 Rules, Resolutions and Executive Orders:	
N.Y. Exec. Order No. 28 (Nov. 18, 1983)	22
Okla. H. Res. No. 1054 (1984)	19
Sup. Ct. R. 36.4	1
 Other Authorities:	
Webster's 3rd International Dictionary (1976)	8

IN THE
Supreme Court of the United States
October Term, 1984

THE BOARD OF EDUCATION OF THE CITY OF
OKLAHOMA CITY, OKLAHOMA,

Appellant,

v.

THE NATIONAL GAY TASK FORCE,

Appellee.

**On Appeal from the United States Court of Appeals
for the Tenth Circuit**

**AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL
OF THE STATE OF NEW YORK, JOINED
BY THE ATTORNEY GENERAL OF
THE STATE OF CALIFORNIA**

Interest of Amici Curiae

The State of New York, by its Attorney General, Robert Abrams, joined by the State of California, by its Attorney General, John Van de Kamp, submit this brief as *amici curiae* pursuant to Supreme Court Rule 36.4.

As chief legal officers of the States of New York and California, *amici* are charged with protecting the civil rights and liberties of their citizens, including public employees, homosexuals and those seeking to discuss unpop-

ular causes. New York and California aggressively enforce their civil rights laws and policies against discrimination in public employment. They seek to protect government employees from discrimination based on unpopular beliefs and lifestyles* and will continue such efforts.

Statement of the Case

Appellees, The National Gay Task Force, whose members include public school teachers employed by appellant, brought this facial challenge to the constitutional validity of Okla. Stat. tit. 70, § 6-103.15. This statute provides, in relevant part, that a teacher, teacher's aide or student teacher "may be refused employment, or reemployment, dismissed or suspended after a finding" that he or she has "advocat[ed], . . . encourag[ed] or promot[ed] public or private homosexual activity in a manner that creates a substantial risk that such [speech] will come to the attention of school children or school employees" and that he or she "[h]as been rendered unfit for his or her position because of such [speech]." Okla. Stat. tit. 70, § 6-103.15. "Public homosexual activity" is defined as sodomy, committed in public with a person of the same sex. The statute does not define "private homosexual activity."

The statute further provides that several factors shall be considered in making a determination of unfitness: the

* For example, New York Executive Order Number 28 provides that no State agency or department shall discriminate on the basis of sexual orientation in any matter pertaining to employment by the State, or in the provision of any State services or benefits. N.Y. Exec. Order No. 28 (Nov. 18, 1983).

likelihood that the speech "may adversely affect students or school employees"; "the proximity" of the speech "in time or place" to that person's official duties; "extenuating or aggravating circumstances"; and "whether the [speech] is of a repeated or continuing nature which tends to encourage or dispose school children toward similar [speech]." *Id.**

Another Oklahoma statute provides that a teacher may be dismissed or refused reemployment for "immorality, willful neglect of duty, cruelty, incompetency, teaching disloyalty to the American Constitutional system of government, or any reason allowing moral turpitude, . . . [or] if convicted of a felony" Okla. Stat. tit. 70, § 6-103. Teachers convicted of heterosexual or homosexual sodomy, or found to have solicited school children for sexual purposes, or otherwise found to have acted immorally or incompetently, or whose extra-curricular advocacy results in willful neglect of their classroom duties, may be immediately suspended and then dismissed, after a hearing, under this latter statutory provision. Section 6-103 remains untouched by the present litigation.

Appellees filed suit in the United States District Court for the Western District of Oklahoma challenging Okla.

* Section 6-103.15 also provides that public school teachers, teacher's aides or student teachers may be dismissed or refused employment upon a finding that they committed sodomy in public with a person of the same sex or upon a finding that they "solicited" or "imposed" "public or private homosexual conduct in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees" Okla. Stat. tit. 70, § 6-103.15. Appellees originally challenged these provisions on first amendment privacy and equal protection grounds but have not appealed the lower courts' adverse decisions on these issues to this Court.

Stat. tit. 70, § 6-103.15 on its face, alleging that it violated their first amendment rights. The district court upheld the statute in its entirety. *The National Gay Task Force v. Board of Education of the City of Oklahoma City*, No. Civ-80-1174-E (W.D. Okla. June 29, 1982). It found the speech portion of the statute constitutional by reading into it a requirement that a teacher be found to have materially and substantially disrupted the school by such speech.

The United States Court of Appeals for the Tenth Circuit reversed the district court to the extent of holding that the statute's restrictions on "advocating . . . encouraging or promoting public or private homosexual activity" constituted an impermissibly overbroad regulation of protected expression. *The National Gay Task Force v. Board of Education of the City of Oklahoma City*, 729 F.2d 1270 (10th Cir. 1984). The court concluded that the statute reached more than advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action," speech outside the scope of first amendment protection. *Id.* at 1274, quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Because the statute reached protected speech, the court reasoned, a teacher could not be fired or refused reemployment for making such speech without a showing "that some restriction is necessary to prevent the disruption of official functions or to insure effective performance by the employee." *The National Gay Task Force*, 729 F.2d at 1274, quoting *Childers v. Independent School District No. 1*, 676 F.2d 1338, 1341 (10th Cir. 1982). The statute failed to require such a showing, the court concluded, rendering that portion of section 6-103.15 unconstitutional.

Summary of Argument

States and local school boards must obey the Constitution in exercising their discretion to manage public school affairs. *Board of Education v. Pico*, 457 U.S. 853, 864 (1982); *Tinker v. Des Moines School District*, 393 U.S. 503, 507 (1969). Oklahoma cannot deprive its teachers of their first amendment rights without proof that the proscribed speech will interfere with classroom duties or proper school functioning. *Givhan v. Western Line Consolidated Schools*, 439 U.S. 410, 414-15 (1979); *Pickering v. Board of Education*, 391 U.S. 563, 569-570 (1968). Oklahoma ignored this first amendment imperative in enacting Okla. Stat. tit. 70, § 6-103.15.

Okla. Stat. tit. 70, § 6-103.15* restricts a wide variety of speech by teachers, teacher's aides and student teachers solely because of the content of that speech, i.e., because it relates to the subject of homosexuality. By the threat of sanctions, it chills the exercise of fundamental rights to speak about an issue. It curtails teachers' first amendment rights without requiring a showing of interference with proper school functioning. Section 6-103.15 must therefore be struck down as a violation of the first amendment, applied to the states through the fourteenth.

Oklahoma retains sufficient power, without relying on section 6-103.15, to refuse to hire, or to discharge or refuse reemployment, to teachers on the grounds of "immorality, willful neglect of duty, cruelty, incompetency, teaching

* Unless otherwise indicated, a reference to section 6-103.15 or "the statute", refers only to that portion of section 6-103.15 before this Court: encouraging, providing or advocating public or private homosexual activity.

disloyalty to the American Constitutional system of government, or any reason involving moral turpitude, . . . [or] if convicted of a felony" Okla. Stat. tit. 70, § 6-103. Under this latter statute, Oklahoma may discharge teachers if their speech or conduct on any subject impedes their professional duties or otherwise interferes with the regular operation of the schools. *Pickering v. Board of Education*, 391 U.S. at 572-73. There is, therefore, no basis for Oklahoma's assertion that, if the lower court's decision is affirmed, Oklahoma will lose its power to remove teachers whose advocacy of illegal conduct interferes with their school duties.

ARGUMENT

I.

By punishing teachers who speak on the subject of homosexuality, Oklahoma has exceeded its constitutional power to manage its schools and public employees.

It is well settled that states and local school boards must exercise their considerable discretion to manage their schools "in a manner that comports with the transcendent imperatives of the First Amendment." *Board of Education v. Pico*, 457 U.S. at 864-65; *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637-38 (1943). As this Court has previously stated, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960), citing *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring).

Thus, a teacher cannot be compelled to relinquish the first amendment rights he or she would otherwise enjoy as a citizen unless the exercise of those rights impedes the teacher's proper performance of his or her daily classroom duties or interferes with the regular operation of the schools. *Pickering v. Board of Education*, 391 U.S. at 572-73; see *Givhan v. Western Line Consolidated School District*, 439 U.S. at 414-15 & n.4; *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 283-84 (1977). Neither can a teacher be refused employment or reemployment on "a basis that infringes his constitutionally protected interests—especially his interests in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

Oklahoma ignored first amendment imperatives in enacting section 6-103.15. That law threatens teachers with dismissal for any discussion of homosexuality other than one which simply condemns it. Oklahoma thereby exerts a chilling effect upon an entire class of present and future public employees—teachers, student teachers and teacher's aides—from speaking out on an issue. And the sanction imposed, dismissal, is too imprecisely related to professional performance or the operation of the schools to pass constitutional muster under *Pickering*.

Because of the importance of the first amendment right to exchange ideas, this Court has invalidated numerous state statutes and actions which sought to suppress the rights of public employees, including teachers, to participate in public affairs. See *Connick v. Myers*, — U.S. —, 103 S.Ct. 1684, 1688-89 (1983). Section 6-103.15 must likewise be invalidated for its far-reaching and inhibiting effects on the rights of public employees.

A. The Statute Reaches Rights to Speech and Association Protected by the First Amendment.

The subject of the statutory provisions at issue in this case, speech which "advocat[es] . . . encourag[es] or promot[es] public or private homosexual activity," includes a plethora of speech traditionally protected by the first amendment.* Oklahoma has chosen to ban such speech

* According to *Webster's 3rd New International Dictionary* (1976), the foregoing words have the following meanings and therefore include the following types of speech:

- (i) advocate: to plead in favor of; defend by argument before a tribunal or to the public; to support or recommend publicly;
- (ii) encourage: to give courage to; to spur on; to hearten; generally "instilling with courage, confidence and purpose or fostering enough of these characteristics by advice, inducement or similar influence to perform or endure"; and
- (iii) promote: to advance, put forward, present.

The district court ignored the plain meaning of these words when it claimed that the statute does not reach:

- (i) a teacher who "merely advocates equality for or tolerance of homosexuality";
- (ii) "a teacher who openly discusses homosexuality";
- (iii) "a teacher who assigns for class study . . . books written by advocates of gay rights";
- (iv) "a teacher who expresses an opinion . . . on the subject of homosexuality"; or
- (v) "a teacher who advocates . . . civil rights for homosexuals."

The National Gay Task Force v. Board of Education of the City of Oklahoma City, No. Civ-80-1174-E slip. op. at 20-21 (W.D. Okla. June 29, 1982). Each of the foregoing types of speech could be said to "support or recommend" (advocate) or "give courage to" (encourage) homosexual activity. Teachers could with justification conclude, therefore, that any political, social or educational speech regarding homosexuality might prompt proceedings under this statute.

by teachers, student teachers or teacher's aides if the speech "creates a substantial risk that such conduct will come to the attention of school children or school employees."

The statutory provisions are applicable whether the speech takes place on or off school grounds or property, during or outside of classes, in public or private, or even within or away from the hearing of another school employee or school child.* There need be only a risk that speech regarding homosexuality will come to the attention of school children or school employees. All possible variations of speech are proscribed simply because of the subject matter—public or private homosexual conduct.** That the speech must also render a teacher unfit (the so-called "nexus" provisions considered in *Point I. B., post*) does little to protect the teacher's right to speak, or to lessen the inhibiting effect of the broad statute.

If applied to the citizenry of Oklahoma as a whole, section 6-103.15(A) and (B) would violate the first amendment. This Court has repeatedly invalidated state regulations that attempt to restrict expression because of its content, its ideas, its message or its subject matter. *See*

* "School employees" are not defined in the statute. Presumably, the term applies to fellow teachers, school secretaries, janitors, administrators, cafeteria workers and any other person employed by the Oklahoma public school system, all of whom are adults.

** The statute must be judged as written because it is not within this Court's power to construe and narrow state laws. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *Gooding v. Wilson*, 405 U.S. 518, 520 (1972); *United States v. 37 Photographs*, 402 U.S. 363, 369 (1971). Contrary to appellant's suggestion, *Gay Activists Alliance v. Board of Regents*, 638 P.2d 1116 (Okla. 1981), did not interpret section 6-103.15. It held that the first amendment prohibited the University of Oklahoma from denying recognition to a student association organized to advocate elimination of legal discrimination against homosexuals.

Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 537 (1980); *Police Department of The City of Chicago v. Mosley*, 408 U.S. 92 (1972).^{*} "To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control." *Id.* at 95-96.^{**}

Oklahoma relies on *Ginsberg v. New York*, 390 U.S. 629 (1968), for the proposition that the state may contract the

^{*} That many individuals believe homosexuality is wrong or evil does not mean that the State may proscribe speech about the subject. "[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969); *see e.g.*, *Carey v. Population Services International*, 431 U.S. 678, 701 (1977) (striking down prohibition against advertising of contraceptives although such advertising is arguably offensive and embarrassing and legitimizes the sexual activity of young people); *Healy v. James*, 408 U.S. 169, 187-88 (1972) (a state college may not restrict speech or association for a local SDS chapter "simply because it finds the views expressed . . . abhorrent").

^{**} Notwithstanding the first amendment's hostility to content-based regulation of speech, Judge Barrett argued in his dissenting opinion in the Tenth Circuit that sodomy is "*malum in se*, i.e., immoral and corruptible in its nature without regard to the fact of its being noticed or punished by the law of the state," the advocacy of which "does not merit any constitutional protection." 729 F.2d at 1276. Judge Barrett's theory of constitutional interpretation was flatly rejected by this Court in *Cohen v. California*, 403 U.S. 15 (1971), in dealing with the display of offensive language. "[I]t is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Id.* at 25; *see also* *People v. Onofre*, 51 N.Y.2d 476, 488 n.3, 415 N.E.2d 936, 940 n.3, 434 N.Y.S.2d 947, 951 n.3 (1980).

Moreover, Judge Barrett's assertion that sodomy is "*malum in se*" ignores a good deal of contrary law. Twenty-six states have decriminalized consensual sodomy between adults in private, and homosexual conduct has been decriminalized in some European countries for years. *See Baker v. Wade*, 553 F. Supp. 1121, 1130 n.17 (N.D. Tex. 1982) (referring to England, France, Holland, Finland).

scope of the first amendment in order to protect children. There, this Court upheld a conviction for selling what would otherwise have been constitutionally protected material to a sixteen year old boy in violation of a state statute, the Court concluding that a state could adjust the definition of obscenity when applied to minors. *Id.* at 638. This case, however, is unlike *Ginsberg* in that it does not deal with obscene speech, which is unprotected by the first amendment. *Id.* at 635; *Roth v. United States*, 354 U.S. 476, 485 (1957). Rather, section 6-103.15 proscribes a wide variety of speech traditionally given the highest protection under the first amendment: speech deemed advocacy, promotion or encouragement of the rights of a portion of our citizenry, homosexuals. "Speech . . . cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. . . . [T]he values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975).

Section 6-103.15 also infringes first amendment rights to petition and to associate. Because the statute reaches any statement of support for homosexuals that could come to the attention of school employees or school children, it discourages teachers from joining together to achieve a common goal, such as decriminalization of sodomy. Yet the practice of persons sharing common views and banding together to accomplish a particular goal is deeply embedded in the American political process. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981); *see Healy v. James*, 408 U.S. at 181-82; *cf. Roberts v. United States Jaycees*, — U.S. —, 104 S.Ct. 3244, 3252 (1984).

(discussing the importance of the right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends as a corresponding right to engage in other activities protected by the first amendment). Collective efforts on behalf of shared goals are especially important in shielding dissident expression from suppression by the majority and in making possible a distinctive contribution by a minority group to the ideas and beliefs of our society. *See e.g., NAACP v. Buttons*, 371 U.S. 415, 431 (1963). For that reason, the right to associate with others is implicit in the freedoms protected by the first amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. at 907-08; *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

The Oklahoma statute is even more likely to infringe on the right to associate for political and social goals because it is aimed at speech bearing a "substantial risk" of coming to the attention of school employees or school children. Prohibiting speech that is likely to come to the attention of school employees or children is an overly broad effort to prohibit the views advocated from reaching a wide audience, which it must do if the speech is to accomplish the intended political and social goals. The Constitution does not permit states to require advocates of protected speech to exercise their rights under the threat that if—even for reasons beyond their control, such as media coverage—the speech should reach a proscribed audience, they would be subject to such drastic sanctions as loss of their employment.*

* There is simply no way for a would-be speaker to know in advance who, or how many, in his or her audience will be sufficiently persuaded or disturbed by what is said to repeat it to others. The speaker need not act at his or her peril absent such prescience, a point we turn to in I. B., *post*.

B. The Statute's Nexus Requirements Do Not Satisfy the *Pickering* Balancing Test Because They Fail to Require a Showing That the Speech Interferes With Professional Duties or Proper School Functioning.

Because Oklahoma's proscription against the advocacy, encouragement or promotion of public or private homosexual activity infringes first amendment rights to speak and associate, Oklahoma and appellant must demonstrate that the proscribed speech impedes the teacher's proper performance of his or her daily duties in the classroom or interferes generally with the regular operation of the schools. *Pickering v. Board of Education*, 391 U.S. at 572-73. "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568; *see Connick v. Myers*, 103 S.Ct. at 1687.

Striking the *Pickering* balance in each context may involve different considerations.

When a teacher speaks publicly, it is generally the content of his statements that must be assessed to determine whether they . . . impede[] the teacher's proper performance . . . or interfere[] with the regular operation of the schools Private expression . . . may . . . bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened . . . by the manner, time, and place in which it is delivered.

Givhan v. Western Line Consolidated School District, 439 U.S. at 415 n.4.

Section 6-103.15 reaches both public and private speech, on or off school property, during or after school hours, by a teacher or by someone who may want to teach in Oklahoma ten years from now, and heard by anyone who may eventually set in motion a process which brings it to the attention of a school employee, regardless of position, or a school child, regardless of age. Indeed, the school child or school employee need not even reside in Oklahoma for the statute to come into play. This blunderbuss approach ignores this Court's cautioning in *Givhan* that content is relevant only in certain situations and that who the teacher speaks to is as important as when he or she speaks.

Given the profusion of speech reached by the statute, the so-called "nexus" requirements of section 6-103.15 cannot possibly strike the proper balance required by *Pickering* and its progeny. They are so broad that they heighten rather than vitiate the statute's chilling effect on teachers who attempt to obey it for fear of losing their jobs. See *Keyishian v. Board of Regents*, 385 U.S. 587, 601 (1967); *Baggett v. Bullitt*, 377 U.S. 360, 374 (1964). They therefore fail to save the statute from unconstitutionality.

The first purported "nexus" requirement is the "likelihood" that the speech will "adversely affect students or school employees." Under this requirement, any person who simply disagrees with or feels threatened by a statement made by a teacher, student teacher or teacher's aide regarding, for example, the desirability of reconsidering the state sodomy statute, could claim to have been "adversely affected" by this statement and bring it to the attention of another school employee, thereby setting in motion the disciplinary proceedings of section 6-103.15 and

perhaps causing the former's dismissal. It is not even required that the statement be directed at the person who claims to have been "adversely affected", so long as the statement may come to the person's attention. Of course, the speaker cannot prevent that which he or she advocates from reaching a particular audience—short of not speaking at all. The Court has therefore made clear that the speech may not be prohibited merely because it comes to the attention of unwilling listeners:

The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

Cohen v. California, 403 U.S. 15, 21 (1971).

Another supposedly narrowing provision is "[w]hether the [speech] is of a repeated or continuing nature which tends to encourage or dispose school children toward similar [speech] or activity." This provision regulates speech without regard to whether it causes interference with school duties. Indeed, it may fairly be said to reach speech that the children themselves do not even hear. It regulates speech that directly or even indirectly encourages others to exercise their first amendment right to speak. The statute reaches far more constitutionally protected speech than is necessary to accomplish the legitimate goal of preventing teachers from proselytizing their students on the subject of homosexuality. Teachers or applicants who engage in

such speech can, in any event, be disciplined under Okla. Stat. tit. § 6-103, discussed *post*.*

Another "nexus" is "proximity in time or place" of the speech to the teacher's official duties. Again, "proximity" without more is a broad, arbitrary restriction absent a further finding, not required by the statute, that the speech interferes with the teacher's official duties or the operation of the schools. Thus, if a teacher were to finish her classroom duty at 3 p.m. and attend a 3:30 p.m. hearing at the state capitol on the Oklahoma sodomy law, her speech would be in proximity of time to her classroom duties but have no effect on or relationship to those duties. Under subsection 6-103.15(C)(2), however, the content of her speech must nevertheless be considered in determining whether she is "unfit."

Finally, the fourth factor is "extenuating or aggravating circumstances." No plausible narrowing construction can be given to this provision, which offers no guidance at all to the teacher who would speak. Instead, inclusion of this factor aggravates the problems of vagueness and overbreadth of the supposedly limiting criteria.

The various "nexus" requirements, in sum, do nothing at all to narrow the kinds of restricted speech to those which affect the teacher's classroom performance. They fail to insure that prior to dismissing or refusing to hire

* Indeed, Oklahoma's use of the phrases "likelihood of adverse affect" and a tendency to encourage or dispose school children toward similar conduct or activity" sounds very much like the "undifferentiated fear or apprehension of disturbance" that this Court has held insufficient to overcome the right to speak. *Tinker v. Des. Moines School District*, 393 U.S. 503, 508 (1969); see *Carey v. Population Services International*, 431 U.S. 678, 701 (1977).

a teacher, student teacher or teacher's aide, there will be adequate proof of interference with the teacher's performance or the functioning of the schools. Without such proof, Oklahoma is simply attempting to proscribe all manner of speech related to homosexuality. This amounts to censorship of an idea, and is prohibited by the first amendment. *Board of Education v. Pico*, 457 U.S. 853, 871 (1982).

C. The Statute Exerts an Unconstitutional Chilling Effect on the First Amendment Rights of Oklahoma School Teachers and Public Employees.

Because the plain words of section 6-103.15 encompass a broad range of speech, especially speech urging social or political change, teachers may easily believe that any political speech they make regarding the rights of homosexuals will lead to initiation of proceedings under section 6-103.15. Appellant, however, contends that a teacher who lobbies the state legislature for repeal of the criminal sodomy statute is protected under section 6-103.15 because the nexus requirements will prevent that teacher from being found "unfit." Aside from the inadequacy of the nexus requirements, discussed *ante*, this argument ignores the chilling effect the statute exerts on Oklahoma's teachers, student teachers, future teachers and teacher's aides regarding the topic of homosexuality. It is no answer to state that, in the end, a teacher probably would be able to prove that there was no connection between his or her speech and professional duties and abilities. What is unacceptable under the first amendment is that he or she may easily conclude that it would be safer not to make the speech at all than to fight for retention after section 6-103.15 has been invoked.

As with the discredited "subversive" statutes of the past, section 6-103.15 serves as a "highly efficient in *terrorem* mechanism," in part because of uncertainty as to its scope. *Keyishian v. Board of Regents*, 385 U.S. at 601. Here, as in the statute struck down in *Keyishian*,

[i]t would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery. The uncertainty as to the utterances . . . proscribed increases that caution in "those who believe the written law means what it says."

Keyishian, 385 U.S. at 601, quoting *Baggett v. Bullitt*, 377 U.S. at 374.

This is the very type of chilling effect that the overbreadth doctrine is meant to avoid. See *Erznoznik v. City of Jacksonville*, 422 U.S. at 216. As this Court has held in striking down other statutes that swept protected speech within their ambit,

The threat of sanctions may deter almost as potently as the actual application of sanctions. (citation omitted) Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society . . .—might be the loser. . . . The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.

Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965).

Appellant contends that section 6-103.15 is necessary to prevent teachers from encouraging their students to com-

mit homosexual acts. As previously discussed, however, the statute on its face reaches much further. It is not restricted to speech advocating that school children commit illegal acts. Instead, the statute in essence states that those who teach in public schools may not speak of homosexuality at any time, in any place, in any way without fear of sanctions. It thereby deters a broad range of protected speech.

That Oklahoma intends by this statute to squelch all speech by teachers, future Oklahoma teachers and teacher's aides about homosexuality is demonstrated by the *amicus* brief of the State of Oklahoma.* It concedes that Oklahoma's intent was not only to prevent teachers from encouraging school children to commit felonious acts, but to promote political neutrality by teachers on controversial subjects. Brief of the State of Oklahoma, *Amicus Curiae*, at 20.**

Even if a state can validly require its teachers to remain politically neutral in the classroom, prohibiting them from commenting in any substantive fashion outside of school about a particular subject strikes at the very heart of the first amendment. To the Oklahoma Legislature, homosexuality is "ungodly" and therefore to be kept from the ears of school children. To the legislators or school officials of another state, Russians or Jews might seem similarly "ungodly" and discussion of them deemed unfit for students'

* See also Okla. H. Res. No. 1054 (1984), directing that the Oklahoma Attorney General assist appellants in this case, stating that "homosexuality is ungodly, unnatural, and unclean"

** The Oklahoma Attorney General's interpretation should be considered an authoritative source. See *Broadrick v. Oklahoma*, 413 U.S. 601, 617-18 (1973).

ears.* As this Court recently reaffirmed, however, the first amendment "was fashioned to assure unfettered interchange of ideas" *Connick v. Myers*, 103 S.Ct. at 1689, quoting *Roth v. United States*, 354 U.S. 476, 484 (1957); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). This right protects teachers as well as other citizens. See *Connick v. Myers*, 103 S.Ct. at 1688-89; *Pickering v. Board of Education*, 391 U.S. at 574.

Appellant and Oklahoma contend that the Oklahoma legislature properly decided that it is necessary to bar from the schools those who speak in any way, even in private, in favor of tolerating homosexuality because they make poor role models for impressionable young children.** Apparently it is the speech itself that creates the problem. Appellant's position states the antithesis of first amendment values, which hold that societal disapproval provides

* Oklahoma also relies on the tenets of certain religious teachings against homosexuality to justify its proscription against teacher advocacy, encouragement or promotion of public or private homosexual acts. See Brief of the State of Oklahoma, *Amicus Curiae*, at 21-22 & n.1. While a law does not violate the establishment clause of the first amendment simply because it coincides with a religious belief, *Harris v. McCrae*, 448 U.S. 297, 319-20 (1980), such a sectarian purpose is nevertheless indicative that the Oklahoma legislature intended far more than merely silencing the advocacy to school children of committing homosexual sodomy.

** *Amicus* the National School Boards Association misstated the holding in *Acanfora v. Board of Education*, 491 F.2d 498 (4th Cir.), cert. denied, 419 U.S. 836 (1974) on page 17 of its brief to this Court. In *Acanfora*, a gay teacher's public statements in the press, radio and television about the problems homosexuals encounter in the community were held to be protected by the first amendment because there was no evidence that his statements disrupted the school or impaired his capacity as teacher. His transfer to an administrative position was upheld only because he had intentionally omitted his membership in a gay rights group from his teaching application.

no excuse for the abridgement of first amendment freedoms. *Carey v. Population Services International*, 431 U.S. at 701; *Healy v. James*, 408 U.S. at 187-88; see *Meyer v. Nebraska*, 262 U.S. 390 (1923).

That dismissal of a teacher for in-class advocacy of illegal conduct could be constitutionally justified under the *Pickering* balancing test and that such speech could lead to sanctions under section 6-103.15 does not make the statute constitutional. This statute, on its face, reaches far more than in-class advocacy of illegal acts to school children. No limiting construction can remove the statute's threat to constitutionally protected expression. *Broadrick v. Oklahoma*, 413 U.S. at 613. It regulates "only spoken words," *id.* at 612, and presents a "real and substantial" danger that protected speech may be muted. *Erznoznik v. City of Jacksonville*, 422 U.S. at 216; see *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). It must therefore be struck down as unconstitutionally overbroad. See *Erznoznik v. City of Jacksonville*, 422 U.S. at 216-17; cf. *Members of the City Council v. Taxpayers For Vincent*, —, U.S. —, —, 80 L.Ed.2d 772, 784 (1984); *Broadrick v. Oklahoma*, 413 U.S. at 612-13. Appellant's acknowledged discretion to control its schools cannot be exercised in such an unconstitutional manner. See *Board of Education v. Pico*, 457 U.S. at 871.

II.

Oklahoma retains statutory authority to terminate or refuse to employ teachers whose speech interferes with the proper functioning of the schools without relying on this unconstitutional statute.

As previously discussed, Oklahoma law allows, independently of section 6-103.15, for the dismissal of unfit teachers by specifically providing that they can be dismissed or refused reemployment "for immorality, willful neglect of duty, cruelty, incompetency, teaching disloyalty to the American Constitutional system of government, or any reason involving moral turpitude." Okla. Stat. tit. 70, § 6-103. It further provides that a teacher "shall be dismissed at anytime or not reemployed if convicted of a felony" *Id.* See *Childers v. Independent School District*, 645 P.2d 992 (Okla. 1981); *Winslett v. Independent School District No. 16*, 657 P.2d 1208 (Okla. App. 1982). Because the foregoing statute amply fulfills Oklahoma's interest in the proper functioning of its schools and teachers, it is clear that section 6-103.15, which singles out one topic of speech, is unnecessary to fulfill that interest.

Amicus is aware of no Oklahoma cases interpreting "immorality" or "moral turpitude" as those terms are used in section 6-103. Okla. Stat. tit. 70, § 6-103. Other states which similarly allow dismissal of teachers for "immorality"* require that the school district prove a connec-

* For example, N.Y. Educ. Law § 3020 provides:

Except as otherwise provided . . . no teacher shall be removed during a term of employment unless for neglect of duty, incapacity to teach, immoral conduct, or other reason which, when appealed to the commissioner of education, shall be held by him sufficient cause for such dismissal.

tion between the conduct at issue and the teacher's performance of his or her classroom duties or the regular functioning of the schools. See *Shipley v. Salem School District*, 64 Or. App. 777, 669 P.2d 1172 (1983) (dismissal of a teacher for assault and battery of a sexual nature upon a twelve year old child who did not attend the teacher's school); *Jerry v. Board of Education*, 35 N.Y.2d 534, 324 N.E.2d 106, 364 N.Y.S.2d 440 (1974) (dismissal for immoral conduct requires impairment of the teacher's professional responsibilities or capabilities); *Morrison v. State Board of Education*, 1 Cal.3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969) (revocation of teaching certificates for immoral and unprofessional conduct not authorized where the teacher had engaged in a homosexual relationship several years previously that had no effect on his teaching duties).

For example, an Illinois court applying a similar statute to an unwed, pregnant school teacher stated, "immorality . . . is sufficient cause [for dismissal] only where the record shows harm to pupils, faculty or the school itself. Otherwise, we would be subjecting teachers to infinitely variable definitions of morality and thereby interpreting the [Teacher Tenure] Act in a manner inconsistent with its purpose." *Reinhardt v. Board of Education*, 19 Ill. App. 3d 481, 311 N.E.2d 710 (1974), *vacated on other grounds*, 61 Ill. 2d 101, 329 N.E.2d 218 (1975). The court adopted the reasoning of an Ohio court in *Jarvella v. Willoughby-Eastlake City School District*, 12 Ohio Misc. 288, 233 N.E. 2d 143 (1967):

The private conduct of a man, who is also a teacher, is proper concern to those who employ him only to the extent it mars him as a teacher. . . . Where his professional achievement is unaffected, where the school community is placed in no jeopardy, his private acts

are his own business and may not be the basis of discipline.

Id. at 146 (overturning a decision to terminate a high school teacher on the grounds of "immorality" for writing several letters containing "gross, vulgar and offensive language" to an eighteen year old student following his graduation).

Under section 6-103, Oklahoma would be able to dismiss a teacher if his or her advocacy of any illegal activity, such as sodomy, interfered with classroom conduct or the proper functioning of the schools. If the teacher advocated illegal acts during his or her class, and thereby neglected the school's chosen curriculum, a clear-cut case would be presented for finding interference, and the school board would be able to meet its burden of proof under section 6-103.9. *See Shurgin v. Ambach*, 83 A.D.2d 665, 442 N.Y.S.2d 212 (3rd Dept. 1981), *aff'd on other grounds*, 56 N.Y.2d 700, 436 N.E.2d 1324, 451 N.Y.S.2d 722 (1982) (upholding dismissal of a tenured high school teacher for knowingly exhibiting a pornographic film to high school students in a photography class).

If the advocacy of illegal conduct takes place outside of school, school officials may again look to whether the teacher's performance is affected. Under section 6-103, Oklahoma is no more barred from dismissing teachers who advocate disobedience of the criminal laws regarding sexual activity than regarding narcotics abuse. The test should be whether the conduct at issue has in fact impaired a particular teacher's performance of his or her responsibilities in the classroom and in the school generally. To accomplish this goal, there is no need additionally to proscribe advocacy of one form of illegal conduct, as Oklahoma has attempted to do with section 6-103.15.

This Court has stated, "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 538 (1980). Upholding the constitutionality of section 6-103.15 would allow Oklahoma to control not only the choice of subjects for debate but to exclude an entire class of public employees from that debate. This the first amendment does not allow.

Conclusion

For the foregoing reasons, this Court should affirm the judgment of the United States Court of Appeals for the Tenth Circuit and hold that Okla. Stat. tit. 70, § 6-103.15 is unconstitutional on its face to the extent that it punishes teachers, student teachers and teacher's aides for pure speech.

Dated: New York, New York
December 17, 1984

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
AMICUS CURIAE
Suite 45-08
Two World Trade Center
New York, New York 10047
(212) 488-7511

ROBERT HERMANN
Solicitor General
Counsel of Record

ROSEMARIE RHODES
LAWRENCE S. KAHN
MARTHA J. OLSON
Assistant Attorneys General
Of Counsel

JOHN K. VAN DE KAMP
Attorney General of the
State of California
AMICUS CURIAE
6000 State Building
350 McAllister Street
San Francisco, California 94102
(415) 557-3991

9
No. 83-2030

Office - Supreme Court, U.S.
FILED
DEC 17 1984
ALEXANDER L. STEVAS,
CLERK

**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1984

THE BOARD OF EDUCATION OF
THE CITY OF OKLAHOMA CITY,
STATE OF OKLAHOMA,

Appellant,

vs.

THE NATIONAL GAY TASK FORCE,

Appellee.

ON APPEAL
FROM THE UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

**BRIEF AMICUS CURIAE OF THE AMERICAN
ASSOCIATION FOR PERSONAL PRIVACY;
FEDERATION OF PARENTS AND FRIENDS OF
LESBIANS AND GAYS, INC.; AND LOS ANGELES
LAWYERS FOR HUMAN RIGHTS IN SUPPORT
OF APPELLEE**

***THOMAS F. COLEMAN**

***JAY M. KOHORN**

Center for Privacy Rights
Education and Advocacy

P. O. Box 6383

Glendale, California 91205

(818) 956-0468

***Co-counsel for Amici Curiae**

68

QUESTION ADDRESSED

Did the Court of Appeals properly invalidate on First Amendment (facial overbreadth) grounds the "advocacy" portion of the Oklahoma homosexual teacher statute?

TABLE OF CONTENTS

	Page
Question Addressed	i
Table of Authorities	iv
Interest of <u>Amici</u>	1
Preliminary Statement	14
Statutory Provisions	19
Summary of Argument	21
Argument	
POINT I -- THE OKLAHOMA STATUTE WAS ENACTED IN A CONTEXT OF SOCIAL HOSTILITY TO HOMOSEXUALS	28
POINT II -- THE "ADVOCACY" PORTION OF THE OKLAHOMA STATUTE WAS DE- SIGNED TO REMOVE AS A TEACHER ANYONE FOUND TO BE A HOMOSEXUAL	36
POINT III -- THE "ADVOCACY" PORTION OF THE STATUTE IS FACIALLY OVER- BROAD IN VIOLATION OF THE FIRST AMENDMENT	41
A. The Deterrent Effect of the "Advocacy" Provision on Le- gitimate Expression is Both Real and Substantial	42
B. The "Advocacy" Portion of the Statute is Not Readily Sub- ject to a Narrowing Construc- tion by the State Courts ..	55

Conclusion	58
------------------	----

TABLE OF AUTHORITIES

Page

Cases:

<u>Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Las Vegas- Tonopah-Reno Stage Line, Inc.</u> 202 F.Supp. 726 (U.S.D.C., D. Nev. 1962)	38
<u>Belloti v. Baird</u> 428 U.S. 132 (1976)	58
<u>Buchanan v. Batchelor</u> 308 F.Supp. 729 (N.D. Tex. 1970), rev. on procedural grounds, <u>Wade</u> <u>v. Buchanan</u> , 401 U.S. 989 (1971)	4
<u>City of Brostow ex rel Hedges v.</u> <u>Brown</u> 151 P.2d 936 (Okla. 1944)	57
<u>Commonwealth v. Bonadio</u> 490 Pa. 91, 415 A.2d 47 (1980)	4
<u>Commonwealth v. Sefranka</u> 414 N.E.2d 602 (Mass. 1980)	4
<u>Erznoznik v. City of Jacksonville</u> 422 U.S. 205 (1975)	42, 55
<u>Gay Activists Alliance v. Board of Regents of the University of Oklahoma</u> 638 P.2d 1116 (Okla. 1981)	57

	<u>Page</u>
<u>Gay Law Students Association v.</u> <u>Pacific Telephone</u> 25 Cal.3d 458 (1979)	5
<u>Gaylord v. Tacoma School District</u> 559 P.2d 1346 (Wash. 1977), <u>cert. den.</u> , 98 S.Ct. 234	39 - 40
<u>Gay Student Services v.</u> <u>Texas A. & M.</u> 612 F.2d 160 (5th Cir. 1980)	5
<u>Maryland Casualty Company v.</u> <u>Figueroa</u> 358 F.2d 817 (1st Cir. 1966)	23, 38
<u>National Gay Task Force v.</u> <u>Board of Education of the</u> <u>City of Oklahoma City</u> 729 F.2d 1270 (10th Cir. 1984)	19, 25 28, 36, 41, 52, 58
<u>People v. Gibson</u> 184 Colo. 444, 521 P.2d 774 (1974) .	5, 55
<u>People v. Ledenbach</u> 61 Cal.App.3d Supp. 2 (1976)	5
<u>People v. Onofre</u> 51 N.Y.2d 476, 415 N.E.2d 936 (1980), <u>cert. den.</u> , 451 U.S. 987 (1981)	4
<u>Pryor v. Municipal Court</u> 25 Cal.3d 238 (1979)	4, 16, 55
<u>Railroad Commission of Texas v.</u> <u>Pullman Co.</u> 312 U.S. 496, 61 S.Ct. 643	58

	<u>Page</u>
<u>State v. Phipps</u>	
58 Ohio State 2d 271, 389 N.E.2d	
1128 (1979)	4
<u>State v. Saunders</u>	
75 N.J. 200, 381 A.2d 333 (1977).....	4
<u>State v. Tusek</u>	
630 P.2d 892 (Ore. App. 1981)	4
<u>State v. Uplinger</u>	
U.S. , 104 S.Ct. 2332, 81 L.Ed.2d	
201 (1984)	5, 7, 10
<u>United States v. Wise</u>	
370 U.S. 405 (1962)	23, 31
<u>Vinyard v. King</u>	
655 F.2d 1016 (10th Cir. 1981)	58
<u>White v. Davis</u>	
13 Cal.3d 757, 533 P.2d 222 (1975)...	38

Constitutions and Statutes:

<u>California Penal Code</u>	
Section 286, subd. (a)	17
Section 288, subd. (a)	18
<u>Oklahoma Constitution</u>	
Art. I, Sec. 2	47
Art. IV, Sec. 1	57
Art. II, Sec. 22	57

	<u>Page</u>
<u>Oklahoma Statutes</u>	
Stat., tit. 70, Sec. 509.9	50
Stat., tit. 70, Sec. 6-103.2	44
Stat., tit. 70, Sec. 6-103.3	47
Stat., tit. 70, Sec. 6-103.15	20
<u>U.S. Constitution</u>	
First Amendment	22, 26, 41, 46
<u>U.S. Statutes</u>	
29 U.S.C.A., Sec. 102	49

Other Authorities:

<u>California Commission on</u> <u>Personal Privacy:</u> <u>Report (1982)</u>	19, 25, 33, 50, 51
<u>California Legislature</u> <u>Senate, Final History,</u> <u>Regular Session 1977-1978</u>	15
<u>California Proposition 6 - 1977</u> <u>(known as Briggs Initiative) ..</u>	6, 10 - 11 14 - 18, 39
<u>California Senate Bill 1253.....</u>	15 - 17
<u>California Voters Pamphlet</u> <u>General Election, 11/7/78</u>	21, 39, 56
<u>Human Rights Commission</u> <u>Norman Oklahoma</u> <u>"Community Attitudes on Homosexuality</u> <u>and About Homosexuals"</u>	32 - 36, 53

	<u>Page</u>
<u>Model Penal Code and Comment</u> <u>American Law Institute (1980)</u>	25
<u>Sexual Law Reporter</u>	2 - 6, 45, 51
"Attempted Repeals of Gay Rights Ordinances: The Facts" 4 Sex.L.Rptr. 61 (1978)	6
"Complete Text of Senator John Briggs Initiative" 3 Sex.L.Rptr. 64 (1977)	6
"Gay Rights Defeat in Dade County Has National Implication" 3 Sex.L.Rptr. 25 (1977)	5
"Governor's Protection of Pennsylvania Gays Upheld" 3 Sex.L.Rptr. 43 (1977)	51
"Non-Commercial Sexual Solicitation" 4 Sex.L.Rptr. 1 (1978)	4
"Repressive Sexual Regulations in Oklahoma: An Analysis" 5 Sex.L.Rptr. 1 (1979)	3
"Seminarian Sues for Degree in Kentucky" 5 Sex.L.Rptr. 20 (1979)	45

No. 83-2030

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE BOARD OF EDUCATION OF THE CITY OF
OKLAHOMA CITY, STATE OF OKLAHOMA,
Appellant,
vs.

THE NATIONAL GAY TASK FORCE,
Appellee.

On Appeal from the United States
Court of Appeals, Tenth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN
ASSOCIATION FOR PERSONAL PRIVACY; FEDER-
ATION OF PARENTS AND FRIENDS OF LESBIANS
AND GAYS, INC.; AND LOS ANGELES LAWYERS
FOR HUMAN RIGHTS IN SUPPORT OF APPELLEE

Interest of Amici

THE AMERICAN ASSOCIATION FOR PERSONAL
PRIVACY (AAPP) is a non-profit California
corporation that promotes, within the
legal profession, education with regard to
the right of privacy and, particularly,
its application to sexual civil liberties.

The AAPP operates through its various functions, including the National Committee for Sexual Civil Liberties, the Academic Union, and the Sexual Law Reporter. Members of the AAPP reside in many jurisdictions throughout the United States and are chosen on an invitational basis because of their professional or scholarly achievements. Members are scholars and practitioners in the fields of law, history, sociology, psychology, and theology, among others.

Through its legal periodical, the Sexual Law Reporter, the AAPP monitored the most significant legal developments affecting sexual civil liberties in the United States from 1974 through 1980, the era in which the statute under scrutiny was adopted by the Oklahoma Legislature.

The AAPP is alarmed by the encroachment on the personal privacy and free

speech rights of Oklahoma teachers which the invalidated portion of the statute represents. The AAPP has an ongoing interest in protecting the civil rights of homosexuals in Oklahoma. Through the National Committee for Sexual Civil Liberties, the AAPP previously has involved itself in litigation involving the constitutional rights of homosexuals in Oklahoma.^{1/}

It is the position of the AAPP that cases involving the civil rights of homosexuals should not be decided out of context. Accordingly, the AAPP, through the National Committee for Sexual Civil Liberties, has filed amicus curiae briefs in a number of such cases, providing the court with the national and historical context

1 "Repressive Sexual Regulations in Oklahoma: An Analysis," 5 Sex.L.Rptr. 1 (1979).

of laws under judicial scrutiny.^{2/}

It is the general policy of the AAPP that, wherever feasible, state courts and state constitutions should be utilized in challenging discriminatory or oppressive laws.^{3/} However, resort to the federal

2 For example, see: Warner, "Non-Commercial Sexual Solicitation," 4 Sex.L.Rptr. 1 (1978) -- a reprint of an amicus curiae brief filed by the National Committee for Sexual Civil Liberties in Pryor v. Municipal Court, 25 Cal.3d 238 (1979).

3 The following cases in which the AAPP has participated through its committees or members reflects this general policy: State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977), (challenge to fornication law); Buchanan v. Batchelor, 308 F.Supp. 729 (N.D. Tex. 1970), rev. on procedural grounds, Wade v. Buchanan, 401 U.S. 989 (1971); Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980); People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936 (1980), cert. den., 451 U.S. 987 (1981) (challenges to sodomy laws); Pryor v. Municipal Court, 25 Cal.3d 238 (1979); State v. Phipps, 58 Ohio State 2d 271, 389 N.E.2d 1128 (1979); State v. Tusek, 630 P.2d 892 (Ore. App. 1981); Commonwealth v. Sefranka, 414 N.E.2d 602 (Mass. 1980) (challenges to non-commercial sexual soli-
(footnote continues)

courts or to the federal Constitution is sometimes essential. It is the position of the AAPP that federal litigation was appropriate in the instant case.

Furthermore, the AAPP has ascertained that the statute under scrutiny was part and parcel of the national "Save Our Children Campaign," instigated by Anita Bryant in early 1977.^{4/} As it spread across the nation, this crusade manifested itself in two forms -- attempted repeals of gay rights ordinances which had been adopted

(footnote 3 continued)
citation laws); State v. Uplinger, ___ U.S. ___, 104 S.Ct. 2332, 81 L.Ed.2d 201 (1984); People v. Gibson, 184 Colo. 444, 521 P.2d 774 (1974); People v. Ledenbach, 61 Cal.App.3d Supp. 2 (1976) (challenges to loitering laws); Gay Student Services v. Texas A & M, 612 F.2d 160 (5th Cir. 1980); Gay Law Students Association v. Pacific Telephone, 25 Cal.3d 458 (1979) (sexual orientation discrimination).

4 "Gay Rights Defeat in Dade County Has National Implications," 3 Sex.L.Rptr. 25 (1977).

by municipalities,^{5/} and introduction of legislation calling for dismissal of homosexual teachers. As demonstrated within, the Oklahoma statute under scrutiny in this case was related to and patterned after California's so-called "Briggs Initiative."^{6/}

The AAPP submits that the arguments contained within demonstrate that the Court of Appeals properly invalidated that portion of the statute which punishes teachers for expressing a non-condemnatory viewpoint on the subject of homosexuality.

THE FEDERATION OF PARENTS AND FRIENDS OF LESBIANS AND GAYS, INC. is a non-pro-

5 Sullivan, "Attempted Repeals of Gay Rights Ordinances: The Facts," 4 Sex.L.Rptr. 61 (1978).

6 "California's Homosexual Teacher Initiative Receives a Major Set-Back; Is Withdrawn," 3 Sex.L.Rptr. 63 (1977); see Statutory Provisions, infra; "Complete Text of Senator John Briggs Initiative," 3 Sex.L.Rptr. 64 (1977).

fit, tax-exempt, all volunteer organization of parents and friends groups throughout the United States. The Federation includes and represents individual parent members in Oklahoma. The purpose of the Federation and its member groups include supporting the full human rights and civil rights of lesbians and gays, assisting parents in the effort to understand, accept, and support their children with love and pride, and providing education for individuals and the community on the nature of homosexuality so that many of the myths and stereotypes which cause fear and discrimination may be dispelled. The Federation filed an amicus curiae brief in State v. Uplinger, fn. 3, supra.

The Federation perceives the invalidated portion of the statute as a form of viewpoint discrimination. Because of society's historical intolerance to homo-

sexuality, misinformation on this subject is the rule rather than the exception. The Federation believes that the invalidated portion of the statute was a legislative attempt to insure that teachers would only make derogatory comments on the subject of homosexuality, thus reinforcing existing misinformation about lesbians and gay men.

The Federation's parent members fear that such reinforcement of misinformation on the subject of homosexuality will continue to result in harassment of, and violence toward, their lesbian daughters and gay sons. Such violence is already too prevalent in our society.^{7/}

7 For example, see: "Violence Against Gays and Lesbians: America's Best Kept Secret," L.I. Connection, February 2, 1983; "Tampa Gays Fear 'Open Season'," Tampa Tribune, Sunday, September 5, 1982; "Violence Rife, Gays Tell Panel," The Milwaukee Journal, Sunday, June 3, 1984; (footnote continues)

The Federation fears that a reversal of the Court of Appeals opinion could trigger an increase in anti-gay violence in the United States. As the Federation argues within, the invalidated portion of the statute requires lesbian and gay teachers to remain silent for fear of reprisal. Revitalizing the invalidated provision could be misinterpreted as

(footnote 7 continued)

"'Gay Bashing' Emerges As Vicious Crime of Hard Times," The Oregonian, Sunday, February 8, 1981; "Just a Prank, Youth Says of 'Gay Bashing,'" San Francisco Chronicle, Thursday, September 6, 1984; "Gay Attacked by Four Youths On Polk Street Dies of Injuries," San Francisco Chronicle, Thursday, August 2, 1984; "Slaying of Homosexual Stirs Quiet Maine City," The Los Angeles Times, Sunday, August 12, 1984; "Tracing Violence Against Gays," Newsday, Sunday, November 28, 1982; J. Harry, "Derivative Deviance: The Cases of Extortion, Fag-Bashing, and Shakedown of Gay Men," 19 Criminology 546 (1982); "Gay Rights Advocate Questions Sentence," Bakersfield Californian, October 11, 1984; "California Needs Stronger Laws Against Bigots Who Resort to Violence," Los Angeles Herald Examiner, Sept. 12, 1984, p. A16.

official approval of reprisals against homosexuals who refuse to hide in fear.

THE LOS ANGELES LAWYERS FOR HUMAN RIGHTS (LHR) is an affiliate of the Los Angeles County Bar Association. LHR was organized in 1976 to provide a focal point from which to address human rights issues, including those which have an impact on the gay and lesbian community. LHR is made up of judges, attorneys and law students from diverse backgrounds. LHR participated as amicus curiae in State v. Uplinger, supra.

LHR has information to show that the statute under scrutiny was modeled after California's so-called "Briggs Initiative." A comparison of the "Invalidated Oklahoma Provision" and the "Defeated California Initiative" indicates that the two measures were cut from the same pat-

tern.^{8/} In August 1977, Senator Briggs submitted a "California Save Our Children Initiative" to the California Attorney General.^{9/} This was the first in a series of steps necessary to qualify the initiative for the ballot.

Because little, if any, information is available on the scope and meaning of the Oklahoma statute, and since that statute was patterned after the California "Save Our Children Initiative," LHR believes that information disclosing the legislative intent behind the California initiative is relevant to show the true meaning and scope of the Oklahoma law. An analysis of the ballot arguments in favor of the California initiative reveals the intended breadth and scope of these legis-

8 See "Statutory Provisions," infra and fn. 6, supra.

9 See fn. 6, supra.

lative measures. As LHR argues within, these measures were intended to permit school districts to remove from the classroom any teacher who discloses his or her sexual orientation to anyone -- either on or off campus -- if such disclosure comes to the attention of school children or school employees.

With that legislative intent in mind, LHR is concerned about the impact such a law has on the ability of a teacher to engage in a wide range of protected speech. If the invalidated portion of the law were allowed to remain in force, a gay teacher could face dismissal for engaging in any of the following forms of protected speech: seeking inclusion of a sexual orientation non-discrimination clause in a union contract with a school district; speaking out on behalf of a gay student being harassed by his or her peers; ap-

pearing on a radio or television talk show dealing with the subject of homosexuality; seeking inclusion of a gay rights plank in the platform of a political party, even if no media attention is sought; filing a lawsuit against a landlord who evicted the teacher because of his or her sexual orientation; defending the morality of gay relationships in a church debate; lobbying for repeal of sodomy laws or passage of a non-discrimination law; or, honest dialogue between a gay teacher and his or her own school-age child.

Being an organization of lawyers, LHR recognizes the "chilling effect" the invalidated portion of the statute has on the right of individuals to defend themselves against verbal abuse and unjust discrimination. LHR believes that the invalidated provision was intended to prevent teachers from defending themselves

or others as illustrated above.

Amici have received written consent from both appellant and appellee to file an amicus curiae brief in this case, and copies of said written consent accompany this brief.

Preliminary Statement

The Oklahoma statute under scrutiny has its origins in the national "Save Our Children" campaign initiated by Anita Bryant in early 1977. As will be demonstrated within, the Oklahoma statute was patterned after a "California Save Our Children Initiative." Accordingly, a summary of the national campaign and the California initiative are relevant as a backdrop to an analysis of the Oklahoma statute.

In early 1977, Anita Bryant's "Save Our Children From Homosexuality" organi-

zation spearheaded an effort resulting in the repeal of a gay rights ordinance in Dade County, Florida. The Florida Legislature followed this lead by passing legislation prohibiting same sex marriages and preventing homosexuals from adopting children. With these victories in hand, Anita Bryant announced that she was waging a national campaign.^{10/}

Bryant enlisted California State Senator John Briggs to carry the "Save Our Children" banner on the California battlefield. On June 14, 1977, Briggs introduced Senate Bill 1253.^{11/} Although private adult homosexual conduct had been decriminalized in California the previous

¹⁰ See fn. 4, supra.

¹¹ California Legislature, Senate, Final History, Regular Session 1977-1978, at 695.

year,^{12/} SB 1253 would have authorized dismissal of teachers who engaged in such private lawful conduct. As introduced, the bill would have allowed school districts to require applicants to furnish a statement that they had not engaged in homosexual activity. The California Attorney General stated publicly that SB 1253 was probably unconstitutional. The Mayor of San Francisco attacked Briggs and Anita Bryant for their anti-gay positions and blamed them for contributing to the death of a gay man in San Francisco. The incident spurring the mayor's comments involved a group of knife-wielding youths who stabbed a gay man to death as they shouted "faggot, faggot," and "here's one for Anita Bryant."^{13/}

¹² Pryor v. Municipal Court, 25 Cal.3d 238, 254 (1979).

¹³ See fn. 4, supra.

In August 1977, the California State Senate refused to pass SB 1253.^{14/} That same month, Briggs submitted a "California Save Our Children Initiative" to the California Attorney General -- the first step necessary to qualify the measure for the ballot.^{15/}

The so-called "Briggs Initiative" stated that "[T]he commission of 'public homosexual activity' or 'public homosexual conduct' by an employee shall subject the employee to dismissal upon determination by the board that said activity or conduct renders the employee unfit for service."^{16/} "Public homosexual activity" was defined as an act defined in subdivision (a) of Section 286 of the Penal Code

14 See fn. 11, supra.

15 See fn. 6, supra.

16 Id.

(sodomy) or in subdivision (a) of Section 288(a) of the Penal Code (oral copulation), upon any other person of the same sex, which is not discreet and not practiced in private, whether or not such an act, at the time of its commission, constituted a crime. "Public homosexual conduct" was defined as "advocating, soliciting, imposing, encouraging, or promoting private or public homosexual activity directed at, or likely to come to the attention of school children and/or other employees."^{17/}

The "Briggs Initiative" was placed before the voters at the 1978 November elections as "Proposition 6." Nearly 60 percent of those who went to the polls that election voted against the mea-

17 Id.

sure.^{18/}

In 1978, Oklahoma enacted a statute apparently patterned after the "California Save Our Children Initiative."

This year, the "advocacy" portion of the Oklahoma statute was declared unconstitutional.^{19/} This appeal followed.

Statutory Provisions

Invalidated Oklahoma Provision

[A] teacher, student teacher or a teacher's aide may be refused employment, or reemployment, dismissed, or suspended after a finding that the teacher or teacher's aide has . . . engaged in public

18 Report of the California Commission on Personal Privacy, State of California (1982), hereinafter "California Privacy Report."

19 National Gay Task Force v. Board of Education of the City of Oklahoma City, 729 F.2d 1270 (10th Cir. 1984).

homosexual conduct

"Public homosexual conduct" means advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees.^{20/}

Defeated California Initiative

The governing board of a school district shall refuse to hire as an employee any person who has engaged in public homosexual activity or public homosexual conduct should the board determine that said activity or conduct renders the person unfit for service.

"Public homosexual conduct" means the advocating, soliciting, imposing, en-

²⁰ Okla. Stat., tit. 70, Sec. 6-103.15.

couraging, or promoting of private or public homosexual activity directed at, or likely to come to the attention of school children and/or other employees. . . .^{21/}

Summary of Argument

It is especially dangerous to a free society for a statute to create such an environment of fear that people are inhibited from speaking and are put in jeopardy for being who they are. Such laws are indicative of many societies other than our own, societies in which the people perceive the United States as the protector and defender of individual freedom and the right to autonomy.

Unfortunately, our own society, out of suspicion and fear, has occasionally had its McCarthy eras. But the accumu-

²¹ California Voters Pamphlet, General Election, November 7, 1978, at 29.

lated wisdom of the nation has ensured that such times are short-lived.

The statute in question represents one of those forays away from our fundamental principles, based upon suspicion and fear. Its very existence -- as any statute having an impact on the First Amendment -- has great significance and grave consequences independent of its actual use by state authorities. Some of those consequences are explored herein.

A determination of the issues before this court, including both the substantive question of whether the statute is facially overbroad and the procedural question of whether this court should defer to the judgment and interpretation of the Oklahoma State Supreme Court through abstention and certification, must necessarily be based upon an evaluation of the scope and application of the statute.

Because the statute in question has never before been interpreted and because a statute which chills the exercise of First Amendment rights is considered so dangerous to a free society, the Court should look especially circumspectly at the statute's intended scope and application.

In determining legislative "intent" when there is nothing explicit in the record, the social and political environment which gave rise to the legislation, as well as the explicit "intent" of analogous statutory language in other states may be important factors to consider.^{22/} The purpose of this brief is to provide information to the court which may be helpful in making that determination.

22 See United States v. Wise, 370 U.S. 405, 411 (1962); Maryland Casualty Company v. Figueroa, 358 F.2d 817, 820 (1st Cir. 1966).

As set forth herein, the statute in question arose within the environment of the national "Save Our Children" campaign, which was aimed at homosexuals in general and homosexual teachers specifically. The intent of such legislation, as discussed in section II of this brief, was to remove from their teaching posts persons whose homosexuality was found out.

The words of the statute are consonant with the intent established by extrinsic evidence. The statute, in pertinent part, mandates refusal of employment or dismissal after "a finding" of the teacher's having advocated, encouraged, or promoted "private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees." The statute would effectively preclude a teacher's participation in the

growth and evolution of society's social conscience and consciousness^{23/} relating to sexual orientation discrimination in all areas, from labor negotiations, work on political party platforms, church policy-making, anti-discrimination litigation, and legislative reform, to interpersonal and professional relationships and intra-family communications. The statute undermines teacher authority by putting homosexual teachers in fear of accusations by disgruntled students. In addition, one's very personality and basis for

23 See California Privacy Report, supra, at 79. At least half the states, through penal law reform or by state supreme court decision, have participated in this evolution to the extent that Judge Barrett's comment (729 F.2d 1270, 1277 (10th Cir. 1984)), quoted on page 33 of Appellant's Brief, labeling sodomy as a crime of universal condemnation, is no longer accurate. Much of the sodomy law reform was prompted by the work of the American Law Institute in the 1950's. See Model Penal Code and Comment, American Law Institute (1980).

familial relationships is difficult if not unwholesome to hide out of fear.

The statute also fails to take into account the fact that we live in an era of electronic communications media which make it totally fortuitous whether information about one's labor union negotiations, political lobbying, or church activities are exposed to public scrutiny, including the scrutiny of students and colleagues. Certainly, the First Amendment would not permit a denial of access to these fora for either a homosexual teacher or a member of the media.

In addition, the statute caters to the biases and prejudices of students and colleagues based upon preconceived myths and stereotypes, i.e., the worst rather than the best aspects of the human personality, aspects which it is the very purpose of education to dispell through

knowledge.

All of these problems, it is submitted, can not be interpreted away, but require a wholesale rewrite of the statute, including striking portions of the language, in contravention of the original purpose of the law. For the federal or state courts to attempt such a diversion from the original and plain intent of the statute would be contrary to both the state and federal Separation of Powers doctrines, to say nothing of the extent to which such action would be inconsistent with the presently expanding doctrines of Judicial Restraint and Abstention. Accordingly, abstention and certification under such circumstances is inappropriate. The statute is facially overbroad.

* * *

ARGUMENT

**POINT
I**

**THE OKLAHOMA STATUTE WAS
ENACTED IN A CONTEXT OF SOCIAL
HOSTILITY TO HOMOSEXUALS**

The Court of Appeals sustained a facial challenge to the "advocacy" portion of the Oklahoma statute, holding that it was substantially overbroad and not readily subject to a narrowing construction by the state courts.^{24/} The Court of Appeals correctly observed that in order to protect their jobs, teachers must restrict their expression. The Court of Appeals further noted that the "advocacy" portion of the statute could be used to dismiss teachers making statements "which are aimed at legal and social change."^{25/}

24 729 F.2d 1270, 1274.

25 Id.

Appellant has objected to the Court of Appeals' interpretation of the "advocacy" portion of the statute. Appellant argues that the statute has never been invoked by a school board in any manner and has never been interpreted by the Oklahoma courts.^{26/}

Amici believe that the Court of Appeals accurately assessed the intended scope and application of the "advocacy" portion of the statute. As will be demonstrated in the section of this brief entitled "Construction of the 'Advocacy' Portion of the Statute," the Oklahoma statute was intended to apply to any teacher who discloses his or her homosexuality, whether such disclosure comes as a response to an official interrogation triggered by a rumor, or whether it is

26 Appellant's Brief, at 14.

necessitated by self defense or as a method of creating social or political change.

However, since the statute apparently has never been interpreted by the Oklahoma state courts, it is appropriate to resort to extrinsic aids in interpreting the intended scope and application of the statute. Assessing the intended scope and purpose of the statute, if possible, is important in order to determine whether a limiting construction by the state court would have been possible. If such limiting construction might have created a valid and constitutionally unobjectionable statute only at the expense of the original constitutionally objectionable legislative intent, however, then deference to the state court would be misplaced and a useless, expensive, and time-consuming exercise having only the potential for

encouraging the state court to violate its Separation of Powers doctrine by judicially legislating a new intent into the statute.

Statutes are to be construed by the courts with reference to the circumstances existing at the time of their passage.^{27/} Thus, Amici suggest that the social attitudes in Oklahoma at the time of this statute's passage are relevant to a proper interpretation of the statute.

A government agency in Oklahoma developed and conducted a survey with the purpose of documenting and preserving information which reflected the social environment in that state during the era in which this statute was enacted.^{28/}

27 United States v. Wise, 370 U.S. 405, 411 (1962).

28 "Community Attitudes on Homosexuality and About Homosexuals -- A report on (foonote continues)

The purpose of the Oklahoma Survey was to determine the attitudes held by various components of an Oklahoma community toward homosexuals.^{29/} The survey noted: "Although this survey was intended to study only the City of Norman, it may be helpful to establish the social environment of both the state and the nation while this project was in progress."^{30/}

Commenting on the social environment during the study period, the Human Rights Commission remarked:^{31/}

(footnote 28 continued)
the environment in Norman, Oklahoma," Norman Human Rights Commission (1978), hereinafter "Oklahoma Survey." The research published in the survey was authorized by the Norman Human Rights Commission on June 23, 1977, and publication of the report was authorized by the Commission on April 27, 1978.

29 Id.

30 Id., at 1.

31 Id.

Numerous reports about homosexuality appeared in the media. The campaign of the "Save Our Children" organization, spearheaded by Anita Bryant, to repeal a recently enacted ordinance protecting homosexuals in Dade County, Florida, received widespread coverage from the newspapers and broadcast media serving Norman.

The survey's results indicate that the environment in Oklahoma in 1977 was extremely hostile to homosexuals.^{32/} Forty-eight percent of landlords surveyed stated that they would refuse to rent to a homosexual couple.^{33/} Twenty-three percent said they would evict an individual believed to be a homosexual.^{34/}

Of the employers participating in the survey, forty-four percent believed an employer should discharge an employee

32 California Privacy Report, at 10.

33 Oklahoma Survey, at 8.

34 Id.

believed to be a homosexual.³⁵ Two-thirds expressed reservations about promoting homosexuals from staff positions into supervisory or management-level ones.³⁶

Of the householders surveyed, three-fourths stated they would oppose living in the same neighborhood as a homosexual couple.³⁷ Two-thirds of householders polled believed that employers should discharge persons believed to be homosexuals.³⁸ Eighty-eight percent of householders believed homosexuals should not be allowed to work as school teachers.³⁹

35 Id., at 10.

36 Id.

37 Id., at 13.

38 Id.

39 Id., at 14.

The report concluded: Norman citizens have strong, negative attitudes toward homosexuals; their strongest objections were associated with employment.^{40/}

The Oklahoma Survey also noted that, in early 1977, the Oklahoma State Senate passed a resolution in favor of Anita Bryant's "Save Our Children" campaign.^{41/} This fact indicates that at least some of the sentiment expressed in the Oklahoma Survey existed in the state legislature near the time of the enactment of the statute in question.

The survey reproduced "representative" comments of those polled. The comments of employers surveyed included: "I'll be the first to invite Anita Bryant and pay all her expenses if such a [non-discrimina-

40 Id., at 16.

41 "Readers' Forum," The Norman Transcript, May 11, 1977.

tion] law is ever considered in Norman," and "We have never hired one and will not if we know about it." Representative comments from local homosexuals included: "The real problem is keeping our gay orientation secret," and "My question is: does the City have the right to make you lie in your life?" 42/

**POINT
II**

**THE "ADVOCACY" PORTION OF THE
OKLAHOMA STATUTE WAS DESIGNED
TO REMOVE AS A TEACHER ANYONE
FOUND TO BE A HOMOSEXUAL**

The Court of Appeals concluded that the deterrent effect of the "advocacy" portion of the statute on legitimate expression was both real and substantial.43/

The Court further concluded that the

42 Id.

43 729 F.2d 1270, 1274.

invalidated provision was not readily subject to a narrowing construction by the state courts.^{44/}

Since these constitutional conclusions are premised, in part, on the legislatively intended scope and application of the statute, a further analysis of legislative intent precedes Amici's argument that the Court of Appeals' constitutional conclusions were accurate.

A comparison of the "Invalidated Oklahoma Provision" and the "Defeated California Initiative," supra, demonstrates that the "advocacy" provisions in the two measures are virtually identical. Although construction of similar legislation in other jurisdictions is not controlling, in the absence of a contrary Oklahoma construction, an examination of

44 Id.

the construction placed upon California's initiative is relevant to an inquiry regarding the statute's intended scope and application.^{45/} As argued within, evidence does exist to show the intended scope and application of the Oklahoma statute's counterpart in California, known as the "Briggs Initiative" or "Proposition 6."

To ascertain the meaning of an initiative, courts may look to the published arguments made in connection with the vote upon the measure. Both federal and state courts have used this approach to determine the intent of an initiative.^{46/}

45 Maryland Casualty Company v. Figueroa, 358 F.2d 817, 820 (1st Cir. 1966).

46 Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Las Vegas-Tonopah-Reno Stage Line, Inc. 202 F.Supp. 726, 736 (U.S.D.C., D. Nev. 1962); White v. Davis 13 Cal.3d 757, 775, fn. 11, 533 P.2d 222 (1975).

Reference to the ballot argument in favor of the "Briggs Initiative" reveals the intended scope and application of the "advocacy" portion of the measure.^{47/} The "Argument in Favor of Proposition 6" stated:^{48/}

This measure will provide for the removal of any teacher, teacher's aide, school administrator or counselor who advocates, solicits, encourages, or promotes homosexual behavior. In the case is Gaylord v. Tacoma 1977, the Supreme Court of the United States upheld the right of a local school board to dismiss a homosexual teacher by refusing to review the case.

Apparently, the "advocacy" portion of the homosexual teacher initiative was intended to apply to situations similar to the circumstances in Gaylord v. Tacoma School District, 559 P.2d 1346 (Wash.

47 California Voters Pamphlet, General Election, November 7, 1978, at 30.

48 Id.

1977), cert. den., 98 S.Ct. 234.

The type of "advocacy" involved in Gaylord, supra, gives a clue as to the intended scope of the proposed California law and its Oklahoma clone. Gaylord was discharged from his teaching position at Wilson High School because he was a "known homosexual." When the vice-principal at Wilson High heard a rumor that Gaylord was homosexual, he confronted the teacher at his home, demanding a response to the allegation. Gaylord admitted he was a homosexual and attempted unsuccessfully to have the vice-principal drop the matter. Gaylord was suspended and ultimately dismissed. The Washington Supreme Court upheld the dismissal despite "uncontroverted evidence" that Gaylord was "a competent and intelligent teacher." Gaylord, supra.

Amici submit that the true intent of

these homosexual teacher measures is to remove from teaching positions any teacher who dares to admit his or her homosexuality, even if such admission occurs in the teacher's home after being confronted with a rumor.

**POINT
III**

**THE "ADVOCACY" PORTION OF THE
STATUTE IS FACIALLY OVERBROAD IN
VIOLATION OF THE FIRST AMENDMENT**

Amici submit that the Court of Appeals correctly concluded the "advocacy" portion of the statute is facially overbroad in violation of the First Amendment.^{49/}

Invalidation of that portion was appropriate because it was "not readily subject to a narrowing construction by the state courts," and "its deterrent effect on legitimate expression is both real and

49 729 F.2d 1270, 1274.

substantial.^{50/}

**A. The Deterrent Effect of
the "Advocacy" Provision on
Legitimate Expression is Both
Real and Substantial**

This issue is most appropriately discussed with reference to the procedural contexts in which dismissal proceedings are likely to arise in Oklahoma.

Many legitimate forms of expressions appear to fall within the ambit of the "advocacy" portion of the Oklahoma Statute: seeking inclusion of a sexual orientation non-discrimination clause in a union contract with a school district; speaking out on behalf of a gay student being harassed by his or her peers; appearing on a radio or television talk show dealing with the subject of homosexuality;

⁵⁰ Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975).

seeking inclusion of gay rights plank in the platform of a political party; filing a lawsuit against a landlord who evicted the teacher because of his or her sexual orientation; defending the morality of gay relationships in a church debate; lobbying for repeal of sodomy laws or passage of a non-discrimination law; or, honest dialogue between a gay teacher and his or her own school-age child.

The difficulties with these scenarios is exacerbated by the fortuitous nature of whether information about a homosexual teacher's participation in any of the mentioned activities is somehow conveyed to students and colleagues. Such uncertainty produces fear of media coverage, although such coverage can not be predicted with much certainty. The obvious remedy to the media foreseeability problem is an exercise of "prior re-

straint."

Although each of these scenarios could be discussed at some length, three examples will be used to illustrate the fact that the "advocacy" portion of the statute has a deterrent effect on legitimate expression.

* * *

Whenever a school principal believes that it is necessary to admonish a teacher "for a reason he believes may lead to the teacher's dismissal or nonreemployment," the principal shall bring the matter to the attention of the teacher in writing. If the teacher does not correct the cause for potential dismissal or non-reemployment, the principal shall make recommendation to the superintendent of the school district for the dismissal or non-reemployment of the teacher.^{51/} Thus, dismis-

51 Okla. Stat., tit. 70, Sec. 6-103.2.

sal proceedings may be triggered by a principal's mere "belief" that a teacher has violated the "advocacy" portion of the statute. What factual circumstances might give rise to such a belief?

The first overbreath example involves a principal and a teacher who are members of the same church congregation. The congregation discovers that a candidate for the ministry is a homosexual.^{52/} Various members of the church are asked to participate on a committee whose purpose is to develop a position paper regarding the ordination of known homosexuals. A high school teacher is asked to serve on the committee. Unbeknownst to the church hierarchy, the teacher is a homosexual. The committee's report recommends against

52 For example, see: "Seminarman sues for degree in Kentucky," 5 Sex.L.Rptr. 20 (1979).

ordination. However, a minority report is authored by the teacher. Rumors spread that the teacher must be a "closet" homosexual. The principal confronts the teacher in church and suggests that the teacher should put the rumors to rest by publicly affirming that he is a heterosexual. The teacher refuses. The principal forms the belief that by refusing to deny the truth of the rumors, the teacher has violated the "advocacy" portion of the dismissal statute. The matter is thus referred to the superintendent with a recommendation that dismissal proceedings be instituted.

As this example demonstrates, the deterrent effect of the "advocacy" portion of the statute on First Amendment rights is both real and substantial. The teacher's activity must be considered a form of "legitimate expression" under

Oklahoma law.^{53/}

* * *

Whenever a superintendent of a school district has reason to believe that cause exists for the dismissal of a teacher, and when he is of the opinion that the immediate suspension of a teacher is necessary in the best interests of the children of the district, the superintendent may suspend the teacher without notice or hearing.^{54/}

The second overbreadth example involves a labor contract between a local teacher's union and a school district. The existing contract does not contain a

53 Okla. Const., Art. I, Sec. 2: "Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship; and no religious test shall be required for the exercise of civil or political rights."

54 Okla. Stat., tit. 70, Sec. 6-103.3.

non-discrimination clause. Two "activist" teachers volunteer to serve on a five-member teacher committee which is drafting proposals for use in upcoming contract negotiations between the teachers' union and the school district. The activist teachers submit a proposal which includes "sexual orientation" among the various forms of discrimination prohibited by the proposed contract. A heated debate within the union ensues. Word gets back to the superintendent that a proposal prohibiting discrimination against homosexuals is being considered by the union. Before long, the whole school district is aware of the proposal. A number of concerned parents meet with the superintendent and demand that the instigators be suspended immediately or they will withdraw their children from school. The superintendent decides that he "has reason to believe"

that cause exists for dismissal of the teacher who drafted the proposal because, in the superintendent's opinion, the proposal constitutes "advocacy" of public or private homosexual activity. The superintendent suspends the two teachers without notice or hearing in an attempt to placate the disgruntled parents.

As this example shows, the "advocacy" portion of the statute infringes on the teachers' First Amendment right to petition the government for redress of grievances. Again, the teachers' activity is a form of "legitimate expression" under both state and federal law.^{55/}

55 Federal labor law articulates a public policy against interference or restraint in labor negotiations. (29 U.S.C.A., Sec. 102). State law recognizes the rights to apply to those vested with powers of government for redress of grievances (Okla. Const., Art. 2, Sec. 3), to engage in collective bargaining for the purpose of mutual aid or protection (Okla. (footnote continues)

It should also be noted that it is not inappropriate to seek official protection against sexual orientation discrimination, including protection against employment discrimination, notwithstanding the present existence of sodomy laws in the state penal code.^{56/}

* * *

(footnote 55 continued)
Stat., tit. 21, Sec. 1265.11), and, for a teacher, to participate in collective bargaining without fear of discrimination (Okla. Stat., tit. 70, Sec. 509.9).

56 Developments in Pennsylvania and Wisconsin illustrate this point. On April 23, 1975, the Governor of Pennsylvania issued an executive order prohibiting discrimination by state agencies on the basis of sexual orientation. (See: California Privacy Report, at 8). A lawsuit was filed challenging the Governor's authority to issue such an order. The legality of the order was affirmed by an intermediate appellate court, notwithstanding the existence of a sodomy law in Pennsylvania at the time the Governor issued his order. Robinson v. Shapp, 350 A.2d 464 (1975). The Pennsylvania Supreme Court, in a per curiam order, affirmed the lower court's order without issuing an
(footnote continues)

The third example involves a classroom situation. A junior high school student is harassed by two of his classmates. The classmates tease the student, using epithets such as "fag" and "queer." The teacher overhears the confrontation. He ponders what approach to take in dealing with the problem. The teacher remembers a similar episode which occurred in an adjoining classroom the previous month. In that previous situation, a teacher had scolded the name callers, told them that whether the victimized student was gay or not was none of their business, and lectured them that gay people have a right to be treated with respect and dignity. The

(footnote 56 continued)
opinion. (See: "Governor's protection of Pennsylvania gays upheld," 3 Sex.L.Rptr. 43 (1977)). Wisconsin enacted a state law prohibiting discrimination on the basis of sexual orientation a year before sodomy was decriminalized. (See: California Privacy Report, at 308-309).

name callers started a rumor that the teacher who scolded them was homosexual. The teacher in the most recent incident is afraid to reprimand the name callers for fear that they will spread a rumor which will result in an investigation of his sexual orientation. To play it safe, the teacher pretends he did not overhear the name calling.

* * *

The Court of Appeals was concerned with the probable application of the "advocacy" portion of the statute to teachers who appeared before the Oklahoma Legislature or appeared on television to urge repeal of the state sodomy law.^{57/} As the examples cited above illustrate, the fact situation described in the Court of Appeals' opinion was only the tip of the

57 729 F.2d 1270, 1274.

"overbreadth" iceberg.

That the statute's deterrent effect on legitimate speech is "real" is not subject to dispute. Reference to the social environment in Oklahoma illustrates this point. Eighty-eight percent of householders surveyed in the Oklahoma Survey stated that homosexuals should not be allowed to work as school teachers.^{58/} Although questionnaires were distributed to members of the gay community, the survey did not tabulate results from this group because of the extremely low rate of return (6%).^{59/} The lack of response from homosexuals was attributed to fear of reprisals.^{60/}

58 Oklahoma Survey, at 14.

59 Id., at 5 and 16.

60 Id.

Amici suggest that the Oklahoma homosexual teacher statute has reinforced the fear experienced by lesbian and gay teachers prior to adoption of that law. A teacher's fear of reprisals -- even for constitutionally protected communications -- is not an insignificant overbreath evil of the present statute. Evidently, the effect this law has on the free speech rights of Oklahoma teachers is exceedingly "real and substantial." Apparently, no teacher in Oklahoma has been willing to risk dismissal by admitting his or her sexual orientation in any public context. As a result, the statute has never been tested or construed by the state courts.

Under these circumstances, amici submit that the Court of Appeals properly invalidated the "advocacy" portion of the statute on facial overbreadth grounds.

**B. The "Advocacy" Portion of
the Statute is Not Readily Subject
to a Narrowing Construction
by the State Courts**

Amici believe they have demonstrated that the deterrent effect of the "advocacy" provision on legitimate expression is both real and substantial. Amici submit that the invalidated provision is not "readily subject" to a narrowing construction by state courts in Oklahoma.^{61/}

Although courts should construe statutes whenever possible so as to avoid constitutional problems,^{62/} they should not construe legislation in a manner which contravenes legislative intent.^{63/}

The legislatively intended scope of

⁶¹ Erznoznik v. City of Jacksonville, supra, at 216.

⁶² Pryor v. Municipal Court, 25 Cal.3d 238, 253 (1979).

⁶³ People v. Gibson, 184 Colo. 444, 521 P.2d 774, 775 (1974).

the "advocacy" portion of the statute is clear. The national "Save Our Children" campaign wanted homosexual teachers removed from the schools. The ballot argument in favor of the proposed California initiative demonstrates that a teacher's mere admission of his or her homosexuality to a student or to another school employee would be considered a violation the "advocacy" provision.^{64/}

If this is the legislatively intended scope of the "advocacy" provision -- and all extrinsic evidence supports that conclusion -- then amici suggest that the Oklahoma courts would have to resort to "judicial legislation" in order to narrowly construe the statute to avoid conflict with the First Amendment, thus violating the state Constitution's mandate on sepa-

64 California Voters Pamphlet, General Election, November 7, 1978, at 30.

ration of powers.^{65/}

Although the Oklahoma Supreme Court might have invalidated the "advocacy" provision on First Amendment grounds,^{66/} or under the free speech provision of the state Constitution,^{67/} amici submit that Oklahoma's highest court would not have found that section of the statute "readily subject" to a narrowing construction.

65 Okla. Const., Art. IV, Sec. 1. Courts must give a statute that construction which the legislature intended at the time it was enacted. City of Brostow ex rel. Hedges v. Brown, 151 P.2d 936, 942 (Okla. 1944).

66 Gay Activists Alliance v. Board of Regents of the University of Oklahoma, 638 P.2d 1116 (Okla. 1981).

67 Okla. Const., Art 2, Sec. 22.

CONCLUSION

As the Court of Appeals noted, "[a] statute is saved from a challenge to its overbreadth only if it is 'readily subject' to a narrowing construction."^{68/} In this case, invalidation -- not construction -- is the only viable method of curing the constitutional defect.^{69/} The decision of the Court of Appeals should be affirmed.

68 729 F.2d 1270, 1275.

69 Similarly, abstention and certification are not appropriate unless the statute to be certified is susceptible of a construction or interpretation which would obviate or limit the need to decide the federal constitutional issues. Belloti v. Baird, 428 U.S. 132, 147 (1976); Vinyard v. King, 655 F.2d 1016, 1018 (10th Cir. 1981), citing Railroad Commission of Texas v. Pullman Co. 312 U.S. 496, 61 S.Ct. 643. Again, as argued earlier in this brief, both the intent behind and the meaning of the words within the "advocacy" portion of the statute mandate invalidation, not interpretation or a new construction. Therefore certification would not be appropriate in this case.

Respectfully submitted,

*THOMAS F. COLEMAN

*JAY M. KOHORN

Center for Privacy Rights
Education and Advocacy

P.O. Box 6383

Glendale, CA 91205

(818) 956-0468

* Co-counsel for Amici Curiae

FILED

DEC 19 1984

ANDER L. STEVAS.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THE BOARD OF EDUCATION OF THE CITY OF OKLAHOMA CITY,
STATE OF OKLAHOMA,

Appellant,

—v.—

THE NATIONAL GAY TASK FORCE,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

**AMICUS CURIAE BRIEF ON BEHALF OF THE APPELLEE BY
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., AND
THE FOLLOWING ORGANIZATIONS: NOW LEGAL DEFENSE AND
EDUCATION FUND; THE LESBIAN RIGHTS PROJECT; GAY AND
LESBIAN ADVOCATES AND DEFENDERS; THE BAR ASSOCIATION
FOR HUMAN RIGHTS OF GREATER NEW YORK; THE COMMIS-
SION ON FREEDOM OF SPEECH OF THE SPEECH COMMUNICA-
TION ASSOCIATION; GAY TEACHERS ASSOCIATION, NEW YORK
CITY; AND GAY AND LESBIAN EDUCATORS OF
SOUTHERN CALIFORNIA.
IN SUPPORT OF AFFIRMANCE**

December 17, 1984

Abby R. Rubinfeld*
Managing Attorney
Evan Wolfson
Rosalyn Richter
Kevin Kopelson
Craig Davidson
Cooperating Attorneys
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
132 West 43rd Street
New York, New York 10036
(212) 944-9488

*Counsel of Record

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICUS CURIAE.....	2
SUMMARY OF ARGUMENT.....	6
ARGUMENT	
POINT I	
THE OKLAHOMA STATUTE VIOLATES THE RIGHTS OF TEACHERS AND OTHER CITIZENS TO SPEAK ABOUT HOMOSEXUALITY, EXPRESSION PROTECTED BY THE FIRST AMENDMENT	7
A) Speech about homosexuality is valuable and important, and is within the mainstream of public debate	8
B) Speech about homosexuality does not fall within any of the narrow categories of unprotected speech	12
C) The Oklahoma statute unconstitutionally deprives teachers of their protected right to speak about homosexuality.....	14
POINT II	
THE SWEEPING PROSCRIPTIONS OF THE OKLAHOMA STATUTE CHILL PROTECTED SPEECH	16
POINT III	
NO ASSERTED STATE INTEREST WARRANTS SUCH A SWEEPING CURTAILMENT OF PROTECTED SPEECH ABOUT HOMOSEXUALITY ..	20

	PAGE
CONCLUSION.....	23
CERTIFICATE OF SERVICE	24

TABLE OF AUTHORITIES

Cases	PAGE
<i>Acanfora v. Board of Education</i> , 491 F.2d 498 (4th Cir.), cert. denied, 419 U.S. 836 (1974).....	8, 14
<i>Aumiller v. University of Delaware</i> , 434 F. Supp. 1273 (D. Del. 1977)	14
<i>Baggett v. Bullitt</i> , 377 U.S. 360 (1964)	18
<i>Bates v. City of Little Rock</i> , 361 U.S. 516 (1960).....	18
<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969)	13
<i>Burton v. Cascade School District</i> , 353 F. Supp. 255 (D. Or. 1973), aff'd per curiam, 512 F.2d 850 (9th Cir.), cert. denied, 423 U.S. 839 (1975).....	20
<i>Cohen v. California</i> , 403 U.S. 15 (1971).....	7, 12
<i>Community Service Broadcasting v. FCC</i> , 593 F.2d 1102 (D.C. Cir. 1978)	19
<i>Dombrowski v. Pfister</i> , 380 U.S. 479 (1965)	16
<i>Fricke v. Lynch</i> , 491 F. Supp. 381 (D.R.I. 1980)	7
<i>Gay Activists Alliance v. Board of Regents of University of Oklahoma</i> , 638 P.2d 1116 (Okla. Sup. Ct. 1981) ..	12
<i>Gay Alliance of Students v. Matthews</i> , 544 F.2d 162 (4th Cir. 1976)	12
<i>Gay Law Students Association v. Pacific Telephone and Telegraph</i> , 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).....	9, 10
<i>Gay Lib v. University of Missouri</i> , 558 F.2d 848 (8th Cir. 1977), cert. denied sub nom., <i>Ratchford v. Gay Lib</i> , 434 U.S. 1080 (1978)	12
<i>Gay Students Organization v. Bonner</i> , 509 F.2d 652 (1st Cir. 1974)	9, 12

	PAGE
<i>Gay Student Services v. Texas A. & M. University</i> , 737 F.2d 1317 (5th Cir. 1984), <i>appeal filed</i> , Oct. 31, 1984.....	7, 12
<i>Hess v. Indiana</i> , 414 U.S. 105 (1973)	13
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967)	13, 16, 18
<i>Morrison v. State Board of Education</i> , 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969)	20
<i>NAACP v. Alabama</i> , 357 U.S. 449 (1958).....	9
<i>NAACP v. Button</i> , 371 U.S. 415 (1963).....	7, 18
<i>NGTF v. Board of Education</i> , 729 F.2d 1270 (10th Cir. 1984).....	13, 16
<i>Norton v. Macy</i> , 417 F.2d 1161 (D.C. Cir. 1969).....	20
<i>Papish v. Board of Curators</i> , 410 U.S. 667 (1973)	7
<i>Pickering v. Board of Education</i> , 391 U.S. 563 (1968)..	14
<i>Police Department v. Mosley</i> , 408 U.S. 92 (1972)	7
<i>Robinson v. California</i> , 370 U.S. 660 (1962)	20
<i>Shelton v. Tucker</i> , 364 U.S. 479 (1960)	19
<i>Spence v. Washington</i> , 418 U.S. 405 (1974)	7
<i>Student Coalition for Gay Rights v. Austin Peay State University</i> , 477 F. Supp. 1267 (M.D. Tenn. 1979)	12
<i>Thornhill v. Alabama</i> , 310 U.S. 88 (1940)	16
<i>Tinker v. Des Moines Independent Community School District</i> , 393 U.S. 503 (1969).....	14, 15
<i>Whitney v. California</i> , 274 U.S. 357 (1927)	12, 20
<i>Wood v. Davison</i> , 351 F. Supp. 543 (N.D. Ga. 1972)...	12

	PAGE
Statutes and Regulations	
Okla. Stat. tit. 70 § 6-103	10
OPM Memorandum, May 12, 1980.....	9
Pub. L. No. 98-377 (Aug. 11, 1984)	17
Wis. Stat. §§ 66.433, 101.22, 111.36	9
Other	
Ballot Pamp. Proposed Amendments to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1978), p. 29	8
Bell and Weinberg, <i>Homosexualities: A Study of Diversity Among Men and Women</i> (1978)	10
Boggan, Haft, Lister, Rupp and Stoddard, <i>The Rights of Gay People</i> (1983).....	9
Boston Globe, Feb. 20, 1982	22
Boswell, <i>Christianity, Social Tolerance and Homosexuality</i> (1981).....	10
Calderone and Johnson, <i>The Family Book About Sexuality</i>	21
Green, <i>Sexual Identities of 37 Children Raised by Homosexual or Transsexual Parents</i> , 135 Am. J. Psychiatry 6 (1978)	21
Hotvedt and Mandel, <i>Lesbians as Parents: A Preliminary Comparison of Heterosexual and Homosexual Mothers and Their Children</i> (1982)	21
Los Angeles Herald-Examiner, Nov. 1, 1978	22
Marmor, <i>Homosexual Behavior: A Modern Reappraisal</i> (1980)	21

PAGE

National Institute of Mental Health Task Force on Homosexuality, <i>Final Report and Background Papers</i> (1972)	10, 21
9 Psychiatric News 1 (1974)	11
Rivera, <i>Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States</i> , 30 Hast- ings L.J. 799 (1979)	9
Rivera, <i>Recent Developments in Sexual Preference Law</i> , 30 Drake L.Rev. 311 (1981)	9
Scholz, <i>Out of the Closet, Out of a Job: Due Process in Teacher Disqualifications</i> , 6 Hastings Const. L.Q. 663 (1979)	18, 22
State of Oregon Department of Human Resources, <i>Final Report of the Task Force on Sexual Preference</i> (Dec. 1, 1978).....	21
Tripp, <i>The Homosexual Matrix</i> (1975)	10
Weinberg, Bell and Hammersmith, <i>Sexual Preference: Its Development in Men and Women</i> (1983).....	21
Wilson and Shannon, <i>Homosexual Organizations and the Right of Association</i> , 30 Hastings L.J. 1029 (1979)	10

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2030

THE BOARD OF EDUCATION OF THE CITY OF OKLAHOMA CITY,
STATE OF OKLAHOMA,

Appellant,

—v.—

THE NATIONAL GAY TASK FORCE,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

**AMICUS CURIAE BRIEF ON BEHALF OF THE APPEL-
LEE BY LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC., AND THE FOLLOWING ORGANIZATIONS:
NOW LEGAL DEFENSE AND EDUCATION FUND; THE
LESBIAN RIGHTS PROJECT; GAY AND LESBIAN ADVO-
CATES AND DEFENDERS; THE BAR ASSOCIATION FOR
HUMAN RIGHTS OF GREATER NEW YORK; THE COM-
MISSION ON FREEDOM OF SPEECH OF THE SPEECH
COMMUNICATION ASSOCIATION; GAY TEACHERS AS-
SOCIATION, NEW YORK CITY; AND GAY AND LESBIAN
EDUCATORS OF SOUTHERN CALIFORNIA.**

INTEREST OF AMICUS CURIAE

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. ("LAMBDA"), appearing as *amicus curiae* with the written consent of the parties to the instant case, is a New York nonprofit corporation, and is the oldest and largest national gay and lesbian legal organization in the country. LAMBDA was organized in 1973 "to seek, through the legal process, to insure equal protection of the laws and the protection of civil rights of homosexuals" and in furtherance of that purpose, "to initiate or join in judicial and administrative proceedings whenever legal rights and interests of significant numbers of homosexuals may be affected." LAMBDA Certificate of Incorporation ¶ 2.2(a).

LAMBDA has appeared as counsel of record or as *amicus curiae* in numerous cases involving the legal rights of gay men and lesbians in state and federal courts throughout the country, including major challenges to statutes which restrict the constitutional rights of lesbians and gay men, and in cases that have challenged laws, regulations, or private actions which discriminate against or restrict the basic civil rights of gay men and lesbians.

In accordance with its purposes, LAMBDA has a strong interest in this case, and submitted an *amicus curiae* brief to the United States Court of Appeals for the Tenth Circuit on behalf of the appellee, National Gay Task Force. LAMBDA is particularly concerned about the far-ranging impact of the challenged statute on the First Amendment rights of teachers and prospective teachers, gay and non-gay alike.

NOW LEGAL DEFENSE AND EDUCATION FUND ("NOW LDEF") is a nonprofit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was established in 1970 by leaders of the National Organization for Women, a membership organization of over 200,000 men and women in

more than 700 chapters throughout the United States. NOW LDEF is particularly concerned with the elimination of barriers that deny gay women, including lesbian teachers, economic and employment opportunities, and with challenging statutes that restrict the First Amendment rights of women and men.

THE LESBIAN RIGHTS PROJECT ("PROJECT") is a San Francisco-based nonprofit public interest law firm organized to protect and defend, through legal action and legal education, the rights of lesbians and gay men. The PROJECT provides representation in both individual and impact cases, conducts community education programs to inform lesbians and gays of their legal rights, holds lawyer education programs to improve the quality of advocacy on behalf of lesbians and gay men, and produces articles, bibliographies and litigation manuals for use by attorneys throughout the country. The PROJECT's attorneys are litigators experienced in constitutional and civil rights litigation, including both First Amendment and teacher cases, in state and federal courts in many areas of the United States.

GAY AND LESBIAN ADVOCATES AND DEFENDERS ("G.L.A.D."), incorporated in Massachusetts as Park Square Advocates, Inc., a nonprofit tax-exempt corporation, was founded to remedy the legal disabilities suffered by gay men and lesbians and is dedicated to the abolition of restrictions on the civil rights of homosexuals in the United States. Through its written materials and public speaking, G.L.A.D. educates the lesbian and gay community, the legal community and the public at large concerning the legal problems suffered by lesbians and gay men and the remedies available for those problems. Through its public interest litigation, G.L.A.D. participates in civil and criminal cases involving lesbians and gay men who have been discriminated against on the basis of their sexual orientation and works to vindicate and expand lesbian and gay civil rights.

THE BAR ASSOCIATION FOR HUMAN RIGHTS OF GREATER NEW YORK ("ASSOCIATION") is a professional association of the legal community concerned with the rights of lesbians

and gay men. Among the purposes cited in its certificate of incorporation are: "to further the science of jurisprudence as it relates to lesbians and gay men" and "to work with lesbian and gay interest groups and individuals to promote the achievement of equal rights for all people in our society." The ASSOCIATION pursues its purposes through provision of legal services on a *pro bono* basis within the lesbian and gay community, educational programs, a legal newsletter, and cooperation with community organizations such as Gay Men's Health Crisis, Inc., and national legal organizations such as LAMBDA. As lawyers concerned with the rights of all citizens to speak out on the legal issues surrounding homosexuality, the members of the ASSOCIATION have a special concern with the questions raised by the instant statute.

THE COMMISSION ON FREEDOM OF SPEECH OF THE SPEECH COMMUNICATION ASSOCIATION ("COMMISSION") was established by the Speech Communication Association in 1961 to promote the study and preservation of freedom of speech in the American educational system. The Speech Communication Association itself is a national professional organization of college and university professors and high school teachers which seeks to encourage research in and the teaching of speech communication. The COMMISSION also submitted an *amicus curiae* brief to the Tenth Circuit on behalf of the appellee, National Gay Task Force.

The GAY TEACHERS ASSOCIATION, NEW YORK CITY ("GTA") and the GAY AND LESBIAN EDUCATORS OF SOUTHERN CALIFORNIA ("GALE") are organizations founded to serve as support systems for and to address the needs of gay and lesbian teachers. The two organizations work to articulate the needs and problems of the thousands of gay and lesbian teachers in Southern California and metropolitan New York City, to insure the rights of gay teachers within those school systems, and to integrate gay teachers in the broader struggle for equal rights for gay men and lesbians. Both organizations have a strong interest in protecting the First Amendment rights of teachers and in challenging the serious infringement of

fundamental constitutional rights of gay and non-gay teachers imposed by the Oklahoma statute.

All of the organizations which have joined LAMBDA in this *amicus curiae* brief share with LAMBDA a deep concern about the severe impact, including the serious chilling effect, of the challenged statute on the exercise of First Amendment rights of all teachers, gay and non-gay, in Oklahoma and around the country.

SUMMARY OF ARGUMENT

Oklahoma's attempt to silence those who would speak out on issues relating to homosexuality violates the First Amendment and chills the expression of ideas and identity. Speech about homosexuality is neither obscenity nor incitement. Speech about homosexuality includes discussion of politics, civil rights, history, culture, family, and personal sentiment, often by people not themselves gay or lesbian. Such important expression is protected by the same strict constitutional safeguards as other speech.

The Oklahoma statute is not only an impermissible restraint on speech based on its content, but an abrupt departure from the well-established First Amendment rights of teachers recognized by this Court. The Tenth Circuit correctly found no legitimate state interest warranting such an invasive interference with expression at the core of public debate and at the heart of personal freedom.

ARGUMENT

POINT I

THE OKLAHOMA STATUTE VIOLATES THE RIGHTS OF TEACHERS AND OTHER CITIZENS TO SPEAK ABOUT HOMOSEXUALITY, EXPRESSION PROTECTED BY THE FIRST AMENDMENT.

The Oklahoma statute is on its face a content-based restriction on expression dealing with issues of homosexuality.¹ The statute is defective in its outright attempt to prevent individuals — gay and non-gay, public employees and private citizens alike — from voicing any but the most negative opinions on one particular subject. This kind of content-based ban on the exchange of ideas has been repeatedly rejected as anathema to democratic self-government and the fulfillment of individual freedom. See, e.g., *Police Department v. Mosley*, 408 U.S. 92, 96 (1972); *Cohen v. California*, 403 U.S. 15, 24 (1971).

The possibility that certain views are not shared by the majority, or are controversial, does not take those views outside the protection of the First Amendment. *Spence v. Washington*, 418 U.S. 405 (1974); *Papish v. Board of Curators*, 410 U.S. 667, 670 (1973); *NAACP v. Button*, 371 U.S. 415 (1963); *Gay Student Services v. Texas A. & M. University*, 737 F.2d 1317 (5th Cir. 1984), *appeal filed*, Oct. 31, 1984; *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980) (First Amendment protects gay high school student's choice of prom date). In fact, protection of such ideas is one of the classic functions of the First Amendment.

¹ This case does not present the issue of the validity of statutes prohibiting private consensual sexual activity between adults. Regardless of the constitutional protection due such intimate choice, however, individuals clearly have the right to discuss it, and even advocate, encourage, and promote it.

Moreover, when prejudice about gay people has been subjected to intense public debate and scrutiny in the free marketplace of ideas, the underlying stereotypes and resulting hostility have often been laid to rest. See, e.g., 1978 defeat of California Proposition 6 ("Briggs Initiative").² In attempting to suppress expressions about homosexuality not conforming to its viewpoint, Oklahoma has violated the most basic First Amendment rights of all its citizens.³ The Tenth Circuit correctly struck down this sweeping restriction on protected speech.

A) Speech about homosexuality is valuable and important, and is within the mainstream of public debate.

The Oklahoma statute prohibits a wide range of constitutionally protected speech of both public and personal significance. Speech about homosexuality punished by this statute includes expression about politics and civil rights. See, e.g., *Acanfora v. Board of Education*, 491 F.2d 498, 500 (4th Cir.), cert. denied, 419 U.S. 836 (1974) ("press, radio, and television commentators considered homosexuality in general, and Acanfora's plight in particular, to be a matter of public interest

² In 1978, the California electorate rejected, by a wide margin, a proposal virtually identical to that subsequently adopted by the Oklahoma legislature as Section 6-103.15. See Ballot Pamp. Proposed Amendments to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1978), p. 29. The Briggs Initiative was condemned by both President Jimmy Carter and California Governor Ronald Reagan. The California vote climaxed months of public debate, in part initiated by singer Anita Bryant's campaign to repeal a Dade County, Florida ordinance barring discrimination based on sexual orientation.

³ Appellant asserts that "only teachers come within [the] ambit" of the statute's restriction on speech (Brief at 34). In fact, on its face, the statute reaches student-teachers and teachers' aides as well. Additionally, all those who wish ever to be a teacher or other school employee suffer directly the statute's impact. Finally, all citizens are harmed by the stifling of free expression, the mandating of state-enforced silence on an important issue, and the heightened stigma to those who believe in the right of Americans to private choice in intimate matters.

about which reasonable people could differ"). Under this statute, therefore, many Oklahoma residents could not advocate the repeal of criminal sodomy laws, although such reform is clearly a political issue of great importance.⁴

Public speech about homosexuality includes association with others of similar viewpoint to achieve political and social ends. See, e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958); *Gay Students Organization v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974) ("communicative opportunities are even more important for [gay groups and their members] than political teas, coffees, and dinners are for political candidates and parties"). In *Bonner*, the First Circuit noted that

beyond the specific communications . . . is the basic "message" . . . that homosexuals exist, that they feel repressed by existing laws and attitudes, that they wish to emerge from their isolation, and that public understanding of their attitudes and problems is desirable for society.

⁴ Courts have recognized that

[t]he aims of the struggle for homosexual rights, and the factors employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities.

See, e.g., *Gay Law Students Association v. Pacific Telephone and Telegraph*, 24 Cal. 3d 458, 488 (1979). Indeed, civil rights for gay men and lesbians and sodomy law repeal are mainstream political issues. The State of Wisconsin has included sexual orientation in its comprehensive civil rights law. Wis. Stat. §§ 66.433, 101.22, and 111.36. Twenty-six states have decriminalized private, consensual, adult homosexual acts. At least forty-nine municipalities have extended statutory protection to gay people in private employment, housing, and public accommodation. Seven states have extended protection to lesbians and gay men by regulation or executive order in public employment. A person may not be found unsuitable for federal employment solely because that person is homosexual or has engaged in homosexual acts. OPM Memorandum, May 12, 1980. The Boards of Education of New York City and Washington, D.C. protect their teachers with policies of nondiscrimination based on sexual orientation. See, generally, Boggan, Haft, Lister, Rupp and Stoddard, *The Rights of Gay People* (1983); Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 Hastings L.J. 799 (March 1979); Rivera, *Recent Developments in Sexual Preference Law*, 30 Drake L.Rev. 311 (1981).

Id. Indeed, "one important aspect of the struggle for equal rights is to induce homosexual individuals to 'come out of the closet', acknowledge their sexual preferences, and to associate with others in working for equal rights." *Gay Law Students Association v. Pacific Telephone and Telegraph*, 24 Cal. 3d at 488 (Tobriner, J.).⁵

Without the ability to associate, there is no exchange of ideas or meaningful opportunity for public debate, yet the Oklahoma statute chills such assembly and thus prohibits the encouragement of legal reforms. The fact that the subject is homosexuality or the exercise of civil rights by gay people does not alter these hallowed principles of free government. See generally, Wilson and Shannon, *Homosexual Organizations and the Right of Association*, 30 Hastings L.J. 1029 (1979).

In addition to political speech and association, speech about homosexuality includes discussions of culture, literature, religion, and history, as well as current events. Just as gay people are everywhere, in every region, religious and ethnic group, economic class, educational level, and occupation, so homosexuality includes aspects of life and society beyond the mere physical intimacy of two human beings who happen to be of the same sex.⁶

⁵ This is not to say that teachers could interrupt their classes or digress from the curriculum to discuss their personal sexual orientation, gay or otherwise. Such a step is already prohibited by other Oklahoma statutes and curriculum guidelines. See Okla. Stat. tit. 70 § 6-103.

⁶ "Homosexual adults are a remarkably diverse group." Bell and Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* 217 (1978). Moreover, as experts have observed,

[h]omosexuality encompasses far more than people's sexual proclivities. Too often homosexuals have been viewed simply with reference to their sexual interests and activities. Usually, the social context and psychological correlates of homosexual experience are ignored, making for a highly constricted image of the persons involved.

Id. at 24-25. See also, e.g., Boswell, *Christianity, Social Tolerance and Homosexuality* (1981); Tripp, *The Homosexual Matrix* (1975); National Institute of Mental Health Task Force on Homosexuality, *Final Report and Background Papers* (1972).

Under the Oklahoma statute, however, a teacher would have been unable to take part in, or speak favorably of, developments such as the reclassification of homosexuality by the American Psychiatric Association.⁷ A prospective teacher in Oklahoma could not attend without fear a local university's presentation of the Broadway show *Bent* with its sympathetic treatment of gay people and their plight under Nazism. This statute would prevent teachers from participating in church-sponsored debates on theology and homosexuality within their denomination.⁸ Such examples demonstrate the extent to which Oklahoma has invaded the rights of its citizens.⁹

⁷ Increased understanding of diversity in sexual orientation resulted in the removal of homosexuality from the list of mental diseases by the American Psychiatric Association in 1973. 9 *Psychiatric News* 1 (1974). Other professional health organizations soon followed suit, some calling for legal and social reform to address anti-gay discrimination. See Resolutions of the American Psychiatric Association (1973, 1974), the Association for Advancement of Behavioral Therapy (1974), the American Psychological Association (1975), the American Medical Association (1975), and the American Public Health Association (1975).

⁸ The following churches and religious organizations have debated and endorsed resolutions calling for civil rights protection against employment discrimination on the basis of sexual orientation: the Lutheran Church of America, the Methodist General Conference, the Presbyterian Church (U.S.A.), the Society of Friends, the Episcopal Church, the American Baptists, the Unitarian Universalist Church, and the National Council of Churches. Other religious groups taking a similar stand include: The National Federation of Priests Councils (the largest association of Roman Catholic priests in the United States), the American Catholic Bishops, the Central Conference of American Rabbis, and the American Jewish Committee.

⁹ While all individuals are harmed by this kind of governmental censorship, gay people are hurt twice—first by its skewing of public debate on an issue of vital importance to them, and, again, by its invasion of their private lives. Gay people suffer when forbidden to meet, talk, and share their thoughts and beliefs openly and freely, consistent with the rights of others. Just as protected speech "conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well," so speech about homosexu-

B) Speech about homosexuality does not fall within any of the narrow categories of unprotected speech.

Clearly, speech about homosexuality does not necessarily, or indeed ordinarily, fall within any category of speech held by this Court to be excluded from the protection of the First Amendment. When speech about homosexuality constitutes defamation, obscenity, or "fighting words," such expression may be prohibited because these categories of speech fall outside the protection of the First Amendment. Any fortuitous content involving homosexuality, however, is irrelevant.

Notwithstanding appellant's claim, public speech about homosexuality simply does not constitute incitement to the commission of homosexual acts. This principle has been recognized, for example, by the numerous courts that have upheld the right of gay student groups to organize and be granted formal recognition by their respective universities. *Gay Student Services v. Texas A. & M. University*, 737 F.2d 1317 (5th Cir. 1984), *appeal filed*, Oct. 31, 1984; *Gay Activists Alliance v. Board of Regents of University of Oklahoma*, 638 P.2d 1116 (Okla. Sup. Ct. 1981); *Student Coalition for Gay Rights v. Austin Peay State University*, 477 F. Supp. 1267 (M.D. Tenn. 1979); *Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir. 1977), *cert. denied sub nom., Ratchford v. Gay Lib*, 434 U.S. 1080 (1978); *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976); *Bonner*, 509 F.2d 652; *Wood v. Davison*, 351 F. Supp. 543 (N.D. Ga. 1972). This right has been upheld even in states where homosexual acts are still illegal. *Gay Lib v. University of Missouri*, 558 F.2d 848; *Gay Alliance of Students v. Matthews*, 544 F.2d 162; *Wood v. Davison*, 351 F. Supp. 543.

ality is essential in order that gay people share in "the premise of individual dignity and choice upon which our political system rests." *Cohen*, 403 U.S. at 24, 26. The "freedom to think as you will and to speak as you think" is as vital to gay citizens as it is to all Americans, not merely for self-government, but for sense of self. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., joined by Holmes, J., concurring).

These courts have acknowledged that such protected speech and association, often for the purpose of political advocacy or social exchange, may not be presumed to involve sexual activity, let alone solicitation.¹⁰ Indeed, this kind of speech and association is precisely what free people are entitled to do, and what a free society rejoices in their doing.

The Oklahoma statute, however, turns this constitutional principle on its head, making the subject matter of the speech, and not, for example, any asserted obscenity or libel, the grounds for censorship and punishment. The statute seeks to smother all but the most negative treatment of gay-related themes, casting an impermissible "pall of orthodoxy" over discussions of homosexuality by teachers and would-be teachers in any Oklahoma forum. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

Appellant seeks to justify this facially evident violation of the First Amendment by minimizing or dismissing the sweep of the statute, the number of those affected by it, and the importance of speech about homosexuality itself. Appellant thus contends that the statute should be seen as "very narrow," reaching nothing but speech directly inciting "criminal homosexual sodomy" in a manner likely to come to the attention of students (Brief at 33).¹¹

¹⁰ The principle that advocacy of the repeal of a criminal law does not constitute unprotected incitement to imminent lawless action was firmly established in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and *Hess v. Indiana*, 414 U.S. 105 (1973). It was for the purpose of reaffirming that principle and applying it to advocacy of the repeal of sodomy laws that the majority opinion below cited these cases. *NGTF v. Board of Education*, 729 F.2d 1270, 1274 (10th Cir. 1984). Appellant and its *amici* thus err in their contention that the Tenth Circuit relied exclusively and inappropriately on the *Brandenburg* test.

¹¹ Appellant relies on the dissent below and its polemic conclusion that speech on homosexuality automatically "involve[s] advocacy of a crime *malum in se* to school children by a school teacher." 729 F.2d at 1277 (Barnett, J., dissenting). Both the appellant and the dissent thus play on the fears of a teacher's potential sexual exploitation of children as a means of obscuring the real effect and sweep of the statute.

In fact, the statute is not confined to in-class speech or a teacher's possible solicitation of sex with students, each dealt with adequately by other Oklahoma statutes. This is not a law narrowly tailored to prevent inappropriate sexual advances; rather, this is a regulation of speech outside the school in any forum, by any teacher or would-be teacher, on matters of public importance to all and of great personal significance to many.

C) The Oklahoma statute unconstitutionally deprives teachers of their protected right to speak about homosexuality.

Teachers have a right to voice their opinions on matters of public concern, including homosexuality, without fear of dismissal or other punitive measures. Although the First Amendment permits a state to regulate speech by its public school teachers somewhat more than speech by its citizenry in general, restrictions on speech by teachers must nevertheless meet stringent constitutional standards. *Pickering v. Board of Education*, 391 U.S. 563 (1968). States have a legitimate interest in restricting only that speech by teachers which causes a substantial and material disruption in the operation of the school. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 737-38 (1969); see also, *Acanfora*, 491 F.2d at 500-01 (junior high school teacher's public speech about homosexuality is protected under the First Amendment); *Aumiller v. University of Delaware*, 434 F. Supp. 1273, 1312 (D. Del. 1977) (First Amendment protects teacher's right to speak publicly on homosexuality).

Appellant and its *amici* would have this Court judge this statute by a standard never before recognized in First Amendment jurisprudence. They urge this Court to create a *per se* rule that speech about homosexuality by a teacher — even outside the school — is automatically disruptive of the school's operations and therefore devoid of First Amendment protection. They thus invert the requirement, laid down by this Court, that

a teacher's expression be regulated not for its content, but for its actual consequences.¹²

That the subject matter of a teacher's speech implicates homosexuality does not justify the abandonment of this protective standard in favor of a state-mandated silence or censorship. Indeed, such a departure from the balance carefully struck in *Pickering* and *Tinker* subverts not only teachers' rights to speak freely but also the First Amendment values that their expression signifies for all citizens. The decision of the Tenth Circuit stands within the shelter erected by this Court to secure the right of teachers to speak their minds on controversial issues. This Court should affirm that decision and the right of free speech it protects.

¹² As this Court held in *Tinker*, "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." 393 U.S. at 508. "[A] mere desire to avoid . . . discomfort and unpleasantness" is also insufficient absent a showing of material and substantial disruption. *Id.* at 509.

POINT II

THE SWEEPING PROSCRIPTIONS OF THE OKLAHOMA STATUTE CHILL PROTECTED SPEECH.

The Oklahoma statute, by allowing punishment of teachers for "advocating . . . promoting or encouraging public and private homosexual activity," takes aim at protected expression in the broadest terms possible. Although the statute incidentally bans some speech concerning sex acts, it also restricts, both directly and indirectly, all but the most hostile expression about homosexuality. Because the statute "does not aim specifically at evils within the allowable area of state control, but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech," *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940), it chills protected speech and therefore must fall.

The very existence of such an overbroad statute chills the exercise of protected rights because individuals limit their speech to that which is unquestionably safe. *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Keyishian v. Board of Regents*, 385 U.S. 589. The Oklahoma statute's proscriptions on speech are so vague and so open-ended that a reasonable teacher or would-be teacher wishing to talk about the sensitive subject of homosexuality has to conclude that nothing is safe.

Appellant disingenuously contends that the statute was not designed to affect speech on homosexuality generally, and that a teacher would not be dismissed for anything but actual advocacy of imminent sodomy. The Tenth Circuit correctly rejected this argument, noting that the statute would permit dismissal of a teacher who testifies before the state legislature urging repeal of the state sodomy law. 729 F.2d at 1274. In fact, the statute goes even further than that. It contains no limiting standards and covers an almost limitless range of expression, burdening all speech on gay issues and involvement in gay organizations, whether by gay or non-gay individuals.

Any teacher or prospective teacher who, for example, participates in a panel discussion on the rights of gay people, wears a button on the street urging the repeal of the Oklahoma sodomy statute, or appears in a demonstration for gay civil rights — all activities outside the classroom — certainly could be said to be "advocating," "promoting," or "encouraging" homosexual activity. Indeed, even membership in the plaintiff organization, which, among other things, lobbies for repeal of state sodomy statutes, could well be seen as encouraging or promoting homosexual activity.

Under the statute, a teacher who acts as a faculty sponsor for a gay student organization would have good reason to fear dismissal for such action, even though the right of gay students to meet on school premises is guaranteed by The Equal Access Act. Pub. L. No. 98-377 (Aug. 11, 1984). Teachers or school aides who are active members in gay religious organizations¹³ or denominations sympathetic to homosexuality, such as the Metropolitan Community Church, might well fear loss of their jobs as a result of such membership. An individual currently enrolled in a teacher training program at an Oklahoma university might not be willing to join a gay student group there, although such organizational membership is protected under the First Amendment. Thus, the statute compels teachers and many other Oklahoma residents to avoid legitimate, constitutionally protected activities.

¹³ There are many gay religious groups, often recognized by, and affiliated with, the parent denominations. A partial listing includes the following: Affirmation (Mormon), Affirmation (United Methodists), American Baptists Concerned, Brethren Mennonite Council for Gay Concerns, Dignity (Catholic), Evangelicals Concerned, Friends Committee on Gay Concerns (Quaker), Gay People in Christian Science, Integrity (Episcopal), Lutherans Concerned, Orion Fellowship Alliance (Seventh-Day Adventist), Presbyterians for Lesbian and Gay Concerns, Seventh-Day Adventist Kinship, Unitarian Universal Office of Lesbian Concerns, Unitarian Universalist Gay Concerns, United Church Coalition for Lesbian and Gay Concerns (United Church of Christ), United Lesbian and Gay Christian Scientists, Congregation Beth Simchat Torah (Jewish).

Appellant claims, nevertheless, that a teacher would not necessarily be dismissed under the statute for sponsoring a gay student group or joining a gay church, and thus any chilling effect is caused by unreasonable fear. This argument ignores the sweeping language of the statute. Given the uncertainty as to its scope,

[i]t would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery. The uncertainty as to the utterances and acts proscribed increases that caution in "those who believe the written law means what it says."

Keyishian, 385 U.S. at 601 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 374 (1964)).

Furthermore, even if some teachers would ultimately not be terminated for their speech about homosexuality, the mere threat of a hearing, and its attendant stigma, is as great a deterrent to the exercise of constitutional rights as actual dismissal.¹⁴ *NAACP v. Button*, 371 U.S. at 433. "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

Appellant insinuates that any claims of a chilling effect are based on mere speculation. However, it is characteristic of a

¹⁴ The statute authorizes a hearing without any showing of actual disruption. Thus, a hearing could be triggered by the unsubstantiated allegation of one person who learns of, or suspects, a teacher's homosexuality or positive attitude toward homosexuality. As a result, a school board ironically could expose expression or conduct that the teacher has been careful not to publicize. Such threatened investigation and exposure was the very tool used in the purges of gay people and other "un-American" individuals from government employment in the 1950's. Scholz, *Out of the Closet, Out of a Job: Due Process in Teacher Disqualifications*, 6 Hastings Const. L.Q. 663, 686 (1979).

chilling effect that those individuals whose speech and expression have been restricted cannot be identified.

Chilling effect is, by its very nature, difficult to establish in concrete and quantitative terms; the absence of any direct actions against individuals assertedly subject to a chill can be viewed as much as proof of the success of the chill as of evidence of the absence of any need for concern.

Community Service Broadcasting v. FCC, 593 F.2d 1102, 1118 (D.C. Cir. 1978). See also, *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

The chilling effect of this statute is both real and substantial. It not only silences those who are already employed in the Oklahoma schools, but effectively restricts the expression of all those who may ever apply for employment as a teacher or teacher's aide in Oklahoma. By stifling their voices in the important public debate on homosexuality, Oklahoma has struck a blow at the First Amendment rights of all its citizens to speak and to hear such protected speech.

POINT III

**NO ASSERTED STATE INTEREST WARRANTS SUCH
A SWEEPING CURTAILMENT OF PROTECTED
SPEECH ABOUT HOMOSEXUALITY.**

In its efforts to save Oklahoma's assault on protected speech, appellant fails to make the constitutionally required showing of disruption, relying instead on a stigmatizing and false portrayal of homosexuality and its purported dangers to schoolchildren.¹⁵ Unable to show any real harm, appellant exploits the unfounded and irrational notion, resulting from myth, ignorance, and prejudice, that homosexuality is transmitted to children by gay teachers.¹⁶

This Court should reject such unsubstantiated pandering to fear and emotion as a substitute for reason and solicitude for important constitutional rights. Without more,

[f]ear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears.

Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., joined by Holmes, J. concurring).

¹⁵ Amicus Washington Legal Foundation suggests that the statute is justifiable because it prevents the transmission of acquired immune deficiency syndrome (AIDS) (Brief at 12-13). This is both incorrect and offensive, and is typical of the reliance of appellant and various amici on prejudice and fear in order to defend an indefensible restriction on protected public speech.

¹⁶ Indeed, this statute does not *per se* prohibit the employment of gay teachers. In fact, such a statute would be unconstitutional as discrimination based on homosexual status. See, e.g., *Burton v. Cascade School District*, 353 F. Supp. 255 (D. Or. 1973), *aff'd per curiam*, 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975); *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969); *Morrison v. State Board of Education*, 1 Cal. 3d 214 (1969). See also, *Robinson v. California*, 370 U.S. 660, 665-67 (1962).

Gay teachers do not make children homosexual. The intimation that gay teachers have a deleterious effect on the sexual development of schoolchildren, let alone proselytize or advocate criminal sodomy, has been consistently refuted.¹⁷ Simply put, there is no scientific evidence which supports a "contagion" theory of homosexual development.

Whatever the origins of homosexuality — whether biological, cultural, psychological, or a combination thereof — the studies show conclusively that it is not a matter of imitation. See, e.g., Weinberg, Bell and Hammersmith, *Sexual Preference: Its Development in Men and Women* (1983); Marmor, *Homosexual Behavior: A Modern Reappraisal* (1980); National Institute of Mental Health Task Force on Homosexuality, *Final Report and Background Papers* (1972). As one authority notes: "If it were merely a matter of imitation, then there would be little or no homosexuality, because for centuries almost all people who are homosexual have come from heterosexual families." Calderone and Johnson, *The Family Book About Sexuality* 114.¹⁸ Moreover, one of the leading scientific experts on the subject of gay sexuality has expressly rejected

¹⁷ Similarly, the notion that the sexual abuse of children is somehow related to homosexuality is equally offensive and spurious. The overwhelming majority of reported criminal child molestations involve adult male molesters of young girls. See, e.g., State of Oregon Department of Human Resources, *Final Report of Task Force on Sexual Preference* 36-41 (Dec. 1, 1978).

¹⁸ Studies conducted of parent-child relationships have demonstrated beyond a doubt that children raised by gay parents are just as likely to be heterosexual as those raised by heterosexual parents. See Hotvedt and Mandel, *Lesbians As Parents: A Preliminary Comparison of Heterosexual and Homosexual Mothers and Their Children* (Research Study funded by the National Institute of Mental Health (1982)); Green, *Sexual Identities of 37 Children Raised by Homosexual or Transsexual Parents*, 135 Am. J. Psychiatry 6 (1978).

the imitation theory, concluding that gay teachers do not influence the sexual orientation of their students.¹⁹

The anti-gay prejudice relied on by appellant has been repudiated by major educational organizations.²⁰ Many groups, including the American Federation of Teachers, the United Federation of Teachers, the National Education Association, the National Council of Teachers of English, and the Washington, D.C. and New York Boards of Education, have formally disavowed discrimination against gay and lesbian teachers. These organizations have declared that the relevant qualification for teachers is their performance on the job, not their sexual orientation or the expression of their personal views outside the classroom. This conforms with the law as expressed in such cases as *Tinker* and *Pickering*.

The Oklahoma statute relies on, indeed, promotes, discredited and harmful myths and stereotypes about gay people and teachers. It chills their speech, burdens their lives and livelihood, and prevents the exchange of ideas and self-expression which the First Amendment so clearly safeguards. By imposing on its citizens a taboo of silence and an atmosphere of accusation when legitimate speech about homosexuality is attempted, Oklahoma has violated the constitutional protections for thought and speech which keep this society open and its people free.

¹⁹ "People don't believe that a child is heterosexual because the teacher is Do they believe a child in Catholic school will become celibate because the nuns are?" Interview of Martin Weinberg, Boston Globe, Feb. 20, 1982, at 16. In 1978, Ronald Reagan made a similar observation in opposition to a proposed California measure virtually identical to the Oklahoma statute. *Two Ill-Advised California Trends*, Los Angeles Herald-Examiner, Nov. 1, 1978, at a-19.

²⁰ Moreover, no state code expressly bars gay and lesbian individuals from the teaching profession. Scholz, *supra*, at 692.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
132 West 43rd Street
New York, New York 10036
(212) 944-9488

By: Abby R. Rubinfeld*
(Counsel of Record)
Evan Wolfson
Rosalyn Richter*
Kevin Kopelson
Craig Davidson

December 17, 1984

* Member of the Bar of this Court.

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of the Rules of the Supreme Court of the United States, the undersigned member of the Bar of the Supreme Court of the United States hereby certifies that three (3) copies of the preceding *Amicus Curiae* Brief on Behalf of the Appellee by Lambda Legal Defense and Education Fund, Inc., were mailed on December 17, 1984, at the U.S. Post Office in New York City, with first class postage prepaid, to counsel of record for the parties at the addresses listed below, as required by Rule 28.3 of the Rules of the Supreme Court.

Larry Lewis, Esq.
4001 N. Lincoln, Suite 410
Oklahoma City, OK 73105
Attorney for the Appellant

Professor Laurence H. Tribe
Griswold Hall 307
Harvard University Law School
Cambridge, MA 02138
Attorney for the Appellee

Dated this 17th day of December, 1984

Abby R. Rubinfeld
(Counsel of Record)
Managing Attorney
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
132 West 43rd Street
New York, New York 10036
(212) 944-9488

15
No. 83-2030

Office - Supreme Court, U.S.
FILED
DEC 24 1984
ALEXANDER L. STEVENS
CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1984

THE BOARD OF EDUCATION OF THE CITY OF
OKLAHOMA CITY, STATE OF OKLAHOMA,
Appellant

v.

THE NATIONAL GAY TASK FORCE,
Appellee

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR APPELLEE

WILLIAM B. ROGERS
American Civil Liberties
Union of Oklahoma
Oklahoma City, Oklahoma
LEONARD GRAFF
Gay Rights Advocates, Inc.
San Francisco, California

LAURENCE H. TRIBE
Counsel of Record
KATHLEEN M. SULLIVAN
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767
Counsel for Appellee

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. ON THEIR FACE, THE PROVISIONS EXCISED BY THE COURT BELOW FROM OKLA- HOMA'S TEACHER-DISMISSAL LAW VIO- LATE THE FIRST AMENDMENT	7
A. The Anti-Advocacy Provisions Impermissibly Censor Protected Public Expression	11
1. Threatening job dismissal for "advocat- ing," "promoting," or "encouraging" homo- sexual activity chills all speech express- ing a viewpoint favorable to homosexu- als	11
2. The speech chilled by the anti-advocacy provisions is protected by the First Amend- ment, even when advanced by public school teachers	16
B. The Statute's Flat Censorship is Wholly Un- necessary to Serve, And Does Not Closely Fit, Any Legitimate State Interest In Preventing Incitement Of Criminal Activity Or Disrup- tion Of The Education Of Children In The Public Schools	22

	PAGE
1. The anti-advocacy provisions sweep far beyond speech that incites or disrupts	24
2. Viewpoint-neutral alternatives to the anti-advocacy provisions are readily available to the state	30
II. ABSTENTION WOULD BE WHOLLY INAPPROPRIATE IN THIS CASE	32
CONCLUSION	37

TABLE OF AUTHORITIES

CASES.

	PAGE
<i>Abood v. Detroit Board of Education</i> , 431 U.S. 209 (1977)	20
<i>Aldrich v. Aldrich</i> , 375 U.S. 249 (1963)	37
<i>Ambach v. Norwick</i> , 441 U.S. 68 (1979)	25
<i>Babbitt v. Farm Workers</i> , 442 U.S. 289 (1979)	33
<i>Baggett v. Bullitt</i> , 377 U.S. 360 (1964)	13, 14, 33
<i>Bates v. Little Rock</i> , 361 U.S. 516 (1960)	12
<i>Bellotti v. Baird</i> , 428 U.S. 132 (1976)	37
<i>Bolger v. Youngs Drug Products Corp.</i> , 103 S.Ct. 2875 (1983)	12
<i>Bose Corp. v. Consumers Union</i> , 104 S.Ct. 1949 (1984)	19
<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969)	17, 18, 24, 25
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973)	9, 10
<i>Butler v. Michigan</i> , 352 U.S. 380 (1957)	25
<i>Carey v. Population Services International</i> , 431 U.S. 678 (1977)	22
<i>Chicago v. Atchinson, Topeka & Santa Fe Railway Co.</i> , 357 U.S. 77 (1958)	32
<i>City Council v. Taxpayers for Vincent</i> , 104 S.Ct. 2118 (1984)	9, 12, 1
<i>Coates v. City of Cincinnati</i> , 402 U.S. 611 (1971)	26
<i>Connick v. Myers</i> , 103 S.Ct. 1684 (1983)	12, 19, 20
<i>Consolidated Edison Co. v. Public Service Commission</i> , 447 U.S. 530 (1980)	12

	PAGE
<i>Cramp v. Board of Public Instruction</i> , 368 U.S. 278 (1961)	14, 33
<i>Dombrowski v. Pfister</i> , 380 U.S. 479 (1965)	35
<i>Dresner v. Tallahassee</i> , 375 U.S. 136 (1963)	37
<i>Elkins v. Moreno</i> , 435 U.S. 647 (1978)	37
<i>Erznoznik v. City of Jacksonville</i> , 422 U.S. 205 (1975)	10, 29, 30, 34, 36
<i>First National Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978)	12, 27, 29
<i>Fricke v. Lynch</i> , 491 F. Supp. 381 (D.R.I. 1980)	28
<i>Gay Law Students Ass'n v. Pacific Tel. & Tel.</i> , 595 P.2d 592 (Cal. 1979)	21
<i>Givhan v. Western Line School District</i> , 439 U.S. 410 (1979)	20
<i>Gooding v. Wilson</i> , 405 U.S. 518 (1972)	31
<i>Grand River Dam Authority v. Oklahoma</i> , 645 P.2d 1011 (S.Ct. Okl. 1982)	34
<i>Hawaii Housing Authority v. Midkiff</i> , 104 S.Ct. 2321 (1984)	32, 34, 35
<i>Healy v. James</i> , 408 U.S. 169 (1972)	17, 22
<i>Hollon v. Pierce</i> , 257 Cal. App. 2d 468, 64 Cal. Rptr. 808 (3d Dist. 1967)	31
<i>Hostetter v. Idlewild Liquor Corp.</i> , 377 U.S. 324 (1964)	32
<i>Hunt v. Washington Fire & Marine Insurance Co.</i> , 381 P.2d 844 (S.Ct. Okl. 1963)	34
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967) ...	12, 13, 14, 17, 20
<i>Kolender v. Lawson</i> , 103 S.Ct. 1855 (1983)	27
<i>Kunz v. New York</i> , 340 U.S. 290 (1951)	15

	PAGE
<i>Kunz v. New York</i> , 340 U.S. 290 (1951)	15
<i>Lehman Bros. v. Schein</i> , 416 U.S. 385 (1974)	32, 37
<i>Livingston v. U.S.</i> , 364 U.S. 281 (1960)	35
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967)	18
<i>Madison School District v. Wisconsin Public Employment Relations Comm'n</i> , 429 U.S. 167 (1976)	12
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923)	25
<i>Monroe v. Pape</i> , 365 U.S. 167 (1961)	35
<i>NAACP v. Alabama</i> , 357 U.S. 449 (1958)	11, 12
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982)	12, 17, 20
<i>New York v. Ferber</i> , 458 U.S. 747 (1982)	9, 10, 25
<i>New York v. Uplinger</i> , 104 S.Ct. 2332 (1984)	8
<i>Noto v. United States</i> , 367 U.S. 290 (1961)	17
<i>Palmore v. Sidoti</i> , 104 S.Ct. 1879 (1984)	22
<i>Patsy v. Board of Regents of State of Florida</i> , 457 U.S. 496 (1982)	35
<i>Perry Education Assn. v. Perry Local Educators' Assn.</i> , 103 S.Ct. 948 (1983)	12
<i>Pickering v. Board of Education</i> , 391 U.S. 563 (1968)	12, 19, 22, 24, 26
<i>Police Department of Chicago v. Mosley</i> , 408 U.S. 92 (1972)	9, 11, 15, 27
<i>Procunier v. Martinez</i> , 416 U.S. 396 (1974)	15, 28, 29, 30, 33 et seq.
<i>Railroad Commission of Texas v. Pullman Company</i> , 312 U.S. 496 (1941)	32, 35
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	18
<i>Saia v. New York</i> , 334 U.S. 558 (1948)	15
<i>Schneider v. State</i> , 308 U.S. 147 (1939)	15

	PAGE
<i>Secretary of State v. Joseph H. Munson Co.</i> , 104 S.Ct. 2839 (1984)	10,
	16, 27, 28
<i>Shelton v. Tucker</i> , 364 U.S. 479 (1960)	23
<i>Sisk v. Sanditen Investments Ltd.</i> , 662 P.2d 317 (Okla. App. 1983)	34
<i>Smith v. California</i> , 361 U.S. 147 (1959)	33
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958)	33
<i>Staub v. City of Baxley</i> , 355 U.S. 313 (1958)	15
<i>Steffel v. Thompson</i> , 415 U.S. 452 (1974)	35
<i>Stromberg v. California</i> , 283 U.S. 359 (1931)	9
<i>Thornhill v. Alabama</i> , 310 U.S. 88 (1940)	8
<i>Thornton v. Woodson</i> , 570 P.2d 340 (S.Ct. Okla. 1977)	34
<i>Tinker v. Des Moines Independent School District</i> , 393 U.S. 503 (1969)	17
<i>United States v. Livingston</i> , 179 F. Supp. 9 (E.D.S.C. 1959)	35
<i>Vance v. Universal Amusement Co.</i> , 445 U.S. 308 (1980)	32
<i>Virginia Board of Pharmacy v. Virginia Consumer Council</i> , 425 U.S. 748 (1976)	29, 30
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	11
<i>West Virginia Board of Education v. Barnette</i> , 319 U.S. 624 (1943)	25
<i>Whitney v. California</i> , 274 U.S. 357 (1927)	17
<i>Wieman v. Updegraff</i> , 344 U.S. 183 (1952)	23, 24
<i>Zant v. Stephens</i> , 456 U.S. 410 (1982)	37
<i>Zwickler v. Koota</i> , 389 U.S. 241 (1967)	35, 36

	PAGE
STATUTES AND PROVISIONS.	
42 U.S.C. § 1983	34, 35
Oklahoma Statutes, Title 20, Section 1602	37
Oklahoma Statutes, Title 21, Sections 856, 857 & 1123	30
Oklahoma Statutes, Title 70, Section 6-103	<i>Passim</i>
Oklahoma Statutes, Title 70, Section 6-103.15	<i>Passim</i>
MISCELLANEOUS.	
"Anita, Gays have their say in separate Capitol events," Oklahoma City Times, at 1-2 (Feb. 21, 1978)	3
"Anita's Plea to Senate: Don't Legislate Immorality," Daily Oklahoman, at 1-2 (Feb. 22, 1978)	3
Bogen, <i>First Amendment Ancillary Doctrines</i> , 37 Md. L. Rev. 679 (1978)	31
Field, <i>The Abstention Doctrine Today</i> , 125 U. Pa L. Rev. 590 (1977)	37
Griffith, <i>In Her Own Right: The Life of Elizabeth Cady Stanton</i> 154 (1984)	18
"National Klan leader terms city youth recruiting good," Oklahoma Times, at 1 (Jan. 26, 1978)	13
Proposition 6, <i>reprinted at California Official Voters Handbook</i> 28-31 (1978)	3
Reagan, "Two Ill-advised California Trends," Los Angeles Herald Examiner, at A-19 (Nov. 1, 1978)	3
Rivera, <i>Book Review</i> , 132 U. Pa. L. Rev. 391 (1984) .	18
The Report of the Platform Committee to the 1984 Democratic National Convention (1984)	13

No. 83-2030
In the
Supreme Court of the United States

OCTOBER TERM, 1984.

THE BOARD OF EDUCATION OF THE CITY OF
OKLAHOMA CITY, STATE OF OKLAHOMA,
Appellant

v.

THE NATIONAL GAY TASK FORCE,
Appellee

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT.

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

The statute challenged in the courts below, Oklahoma Statutes, Title 70, Section 6-103.15,¹ was enacted by the Oklahoma

¹The statute is reprinted in full in the Joint Appendix (hereinafter, cited as "JA") at JA11-12. The opinions of the courts below are reprinted in the Appendix to the Jurisdictional Statement (hereinafter, cited as "App.>").

Legislature in April 1978, as an addition to the section of Oklahoma law providing for dismissal of public school teachers. The general dismissal-for-cause provision, *id.*, Section 6-103, authorizes the dismissal of any teacher for actions demonstrating "immorality, willful neglect of duty, cruelty, or . . . moral turpitude." It could hardly have been doubted, then or now, that this general dismissal provision, entirely independent of the addition of Section 6-103.15, would amply authorize the firing of any teacher who were to incite or coerce school children into committing illegal sexual acts — whether homosexual or heterosexual. Nor could it have been doubted that Section 6-103 encompassed the state's power to fire any teacher whose speech imminently threatened such harms. Thus, Section 6-103.15, although labeled a provision concerning "homosexual conduct or activity," was clearly not added to the teacher-dismissal statute in order to fill any gap in the state's arsenal of defenses against teachers who actually might threaten the physical well-being of their students, for no such gap existed.

Rather, Section 6-103.15 was enacted to permit the state to fire any teacher who so much as "advocate[s]," "encourage[s]," or "promote[s]" "public or private homosexual activity"² in a manner open and public enough to "come to the attention of school children or school employees."³ And it was only these

²Section 6-103.15(A) defines "public homosexual activity" as the commission of sodomy, which is still criminal for all persons in Oklahoma, *see* Okla. Stat., Title 21, Section 886, if that crime is committed "with a person of the same sex," Section 6-103.15(A)(1)(a).

³The statute was enacted on the crest of a wave of cross-country anti-homosexual activism spearheaded by the singer, native Oklahoman, and indeed, former Miss Oklahoma, Anita Bryant. The Oklahoma Legislature, while considering the bills it soon enacted as Section 6-103.15, was urged by Ms. Bryant in a speech she gave in the Oklahoma Senate chambers to approve such legislation, which she believed would help to stop "the flaunting of homosexuality," and to protect school children from exposure to those who "profess

three provisions that the decision below invalidated as posing an explicit and excessive threat to freedom of speech. *See* 729 F.2d 1274 (App.7a), 1275 (App.8a).

In its complaint filed below in the District Court for the Western District of Oklahoma, appellee National Gay Task Force alleged, *inter alia*, that "[i]ts membership . . . includes both present and prospective teachers and principals of the Oklahoma City School District, which members desire to discuss the subject of homosexuality within such school district,

homosexuality." *See* "Anita, Gays have their say in separate Capitol events," *Oklahoma City Times*, at 1-2 (Feb. 21, 1978); "Anita's Plea to Senate: Don't Legislate Immorality," *Daily Oklahoman*, at 1-2 (Feb. 22, 1978).

A statute virtually identical to Section 6-103.15 was placed on the November 1978 state ballot in California as an initiative measure (Proposition 6, *reprinted* at California Official Voters Handbook 28-31 (1978)), but was defeated at the polls. President Ronald Reagan, who was then the former governor of California, voiced strong opposition to Proposition 6 in an op-ed column he wrote just prior to Election Day. In that column, he argued:

Had Proposition 6 been confined to prohibiting the advocacy in the classroom of a homosexual lifestyle (and sex-before-marriage, "swinging," and adultery, for that matter), it would . . . enjoy . . . wider support. . . . Instead, the measure calls for firing teachers who engage in . . . "advocating, . . . encouraging or promoting private or public homosexual activity." It is that passage — and especially the undefined word "advocacy" — that has generated heavy bipartisan opposition to the measure.

Since the measure does not restrict itself to the classroom, every aspect of a teacher's personal life could presumably come under suspicion. What constitutes "advocacy" of homosexuality? Would public opposition to Prop. 6 by a teacher — should it pass — be considered advocacy?

* * * * *

Here is one heterosexual . . . who, where Prop. [6 is] concerned, hopes the answer is "no."

Reagan, "Two Ill-Advised California Trends," *Los Angeles Herald Examiner*, at A-19 (Nov. 1, 1978). With the defeat of Proposition 6, Oklahoma's Section 6-103.15 remains without parallel in any other jurisdiction.

but fear to do so because of the enactment of 70 O.S. Sec. 6-103.15. Such members wish to advocate civil and constitutional rights for homosexual persons but fear and are inhibited [in] their public and private expression of opinion on homosexuality, and on civil liberties for homosexuals because of the possibility of dismissal and/or foreclosure of future employment in the Oklahoma City School District." Complaint, para. 4 (JA 4).⁴ The complaint further alleged that this chilling effect on its members' speech and association rights violated the First and Fourteenth Amendments. *Id.* at para. 9(a) (JA6). On these as well as assorted other constitutional claims, the district court (Eubanks, J.) denied the summary judgment moved for by the National Gay Task Force. *See* App.1b-22b.⁵

The Tenth Circuit, in an opinion written by Judge Logan and joined by Judge McKay, reversed the judgment of the district court *only* insofar as the lower court had upheld the statute's authorization to public officials to deny public school teaching jobs⁶ to those who engage in "advocating . . . encouraging or promoting public or private homosexual activity," 729 F.2d at 1275 (App.7a) (ellipsis in the original). The court held these three provisions "unconstitutionally overbroad," with a "real and substantial" deterrent effect on expres-

⁴This allegation was supported by an affidavit submitted by appellee in support of its motion in the district court for summary judgment. *See* R. 223 (Attachment to Motion of Plaintiff for Summary Judgment, filed Nov. 18, 1981).

⁵In connection with appellee's motion for summary judgment, the parties filed a stipulation in the district court on November 25, 1981, stating that they "agree there is no genuine issue as to any material fact herein, that there is no necessity or desirability of an evidentiary hearing or the taking of evidence, and that the Court may decide the issues presented by the pleadings as a matter of law." R.286.

⁶Section 6-103.15(B) includes within its sweep student teachers and teachers' aides as well as teachers. The term "teachers" is intended hereinafter to include all these groups.

sion protected by the Constitution. *Id.* at 1274 (App.6a). The court left fully intact, however, that portion of Section 6-103.15 authorizing schools to fire or refuse to hire teachers who engage in public homosexual acts. *See id.* at 1273 (App.4a-5a). It also left fully intact that portion of Section 6-103.15 authorizing schools to fire or refuse to hire teachers who "solicit" or "impose" homosexual activity — expression going beyond mere abstract advocacy. *See id.* at 1274-75 (App.6a-8a).

To be sure, as the court noted, *id.* at 1274-75 (App.6a-7a), Oklahoma, by adding Section 6-103.15, did not guarantee automatic exclusion from its public schools of all teachers who might give voice to views sympathetic to homosexuals and their rights, for the statute left school authorities with discretion to tolerate instances of pro-homosexual speech as harmless, in a particular case, by reference to the four criteria listed in Section 6-103.15(C), *see* JA12. But, as the court below found, these factors left discretion to censor speech simply too unbri-dled in the hands of school authorities, guiding them as to neither the "weight" nor the necessity of these factors to a finding of teacher unfitness. 729 F.2d at 1275 (App.7a). Judge Barrett dissented, finding the statute's anti-advocacy provisions an appropriate prophylactic against the "encourage[ment of] school children to commit the abominable crime against nature." *Id.* at 1277 (App.11a).

The Oklahoma City Board of Education brought an appeal in this Court from the Tenth Circuit's judgment; the National Gay Task Force filed no cross-appeal on the issues decided adversely to it. Accordingly, all that is at issue in this case is whether the First Amendment forbids Oklahoma from adding, above and beyond its arsenal of defenses against harmful conduct by public school teachers, a separate penalty upon pure speech that expresses a point of view sympathetic to homosexuals.

SUMMARY OF ARGUMENT

All that the circuit court excised from Oklahoma's statutes was this explicit threat, directed by law in 1978 to every public school teacher in the state, and to every person who aspires ever to teach in Oklahoma's public schools:

If you value your job as a teacher, or want ever to hold such a position here, then make no statement in public, or within another's hearing, that might one day brand you as sympathetic to homosexuals or their rights, and take part in no group or activity that might be seen as so inclined. For any such statement or association might be deemed by school authorities to "advocate," "promote," or "encourage" homosexual activity; might well "come to the attention of school children or school employees"; might be thought to "adversely affect" students or school employees in some way; and might not be deemed so harmless by those in a position of authority as to qualify for dispensation under the "extenuating . . . circumstances" proviso of Oklahoma's law. The only way to be safe is either to steer clear of this whole topic and of groups concerned with it or, whenever the subject comes up, to proclaim your complete aversion to homosexuals and your unwavering disapproval of their activities and their cause.

The circuit court was entirely correct in holding this statutory threat — one that is apparently unique among the fifty states — facially repugnant to the First Amendment at the behest of teachers and would-be teachers who alleged that, but for this explicit threat, they would feel free to discuss the subject of homosexuality in public — a freedom the state's law had denied them.

With that threat removed, all of Oklahoma's public school teachers remain fully subject to the control of school boards as to what they teach; to dismissal for cause should they incite or solicit illegal acts or disrupt the school environment; and to criminal prosecution should they molest or make lewd or indecent proposals to any child. Thus no statement or action unprotected for public school teachers by the First Amendment is encouraged, and need go undisciplined, by virtue of the circuit court's ruling. All that the state lost with that ruling is the ability to proceed by means of an expressly censorial statute, one aimed against a viewpoint disfavored by the majority — something the state was never meant, under the First Amendment, to enjoy.

To disturb the circuit court's narrow ruling — even for the limited purpose of deferring a final federal adjudication until Oklahoma's courts have been given an opportunity somehow to recast the state's broad, viewpoint-specific provisions into a constitutionally tolerable form — would reinstate, for a period of time intolerable even if it proved brief, a regime of fear wholly inimical to the Constitution's free speech guarantee. No legitimate concern of Oklahoma, and none of the important purposes served by federal abstention in cases of readily narrowable state laws, would be advanced by such a step — or, indeed, by any step short of outright affirmance of the judgment below.

ARGUMENT

I. ON THEIR FACE, THE PROVISIONS EXCISED BY THE COURT BELOW FROM OKLAHOMA'S TEACHER-DISMISSAL LAW VIOLATE THE FIRST AMENDMENT.

The court below invalidated only that portion of Oklahoma's teacher-dismissal law which threatens every present or prospec-

tive public school teacher with loss of a job for merely "advocating," "encouraging," or "promoting" homosexual activity.⁷ The court below ruled these provisions "unconstitutionally overbroad," finding their "deterrent effect" on legitimate expression to be "both real and substantial." 729 F.2d at 1274 (App.7a). Not only is this holding clearly correct; if anything, it understates the constitutional deficiency of the anti-advocacy provisions, for two reasons.

First, this is not a case where the state took aim even-handedly at legitimately proscribable conduct and simply overshot a bit, producing an "overbroad" statute that merely happens to sweep some protected expression within its reach.⁸ Rather, this is a case where the state fired in the wrong direction altogether, taking aim directly at the expression of a specific point of view that it strongly disfavored.⁹ Indeed, the anti-ad-

⁷ These three provisions of Section 6-103.15(A)(2) will be referred to collectively as the "anti-advocacy provisions." The circuit court explicitly left intact the provisions permitting job dismissal or rejection for "soliciting" or "imposing" homosexual activity. 729 F.2d at 1274 (App.7a) (holding statute unconstitutionally overbroad only insofar as it "proscrib[es] advocating, encouraging or promoting homosexual activity"), 1275 (App.8a) (reversing judgment of the district court only with respect to statute's penalty on "'advocating . . . encouraging or promoting public or private homosexual activity'" (ellipsis in original)). Appellee has not cross-appealed this part of the judgment below. Accordingly, whether homosexual *solicitation* is constitutionally protected is simply *not* an issue before the Court in this case. That issue, like the underlying question whether the Constitution protects homosexual activity itself, was left unresolved by the Court's disposition last Term of *New York v. Uplinger*, 104 S. Ct. 2332 (1984) (per curiam), and must await decision by this Court another day.

⁸ Overbroad statutes of this sort might include a prohibition on *all* picketing which happens to sweep protected peaceful picketing within its reach, *see Thornhill v. Alabama*, 310 U.S. 88 (1940), or a law against *all* barratry which happens to sweep protected litigation practices within its reach, *see NAACP v. Button*, 371 U.S. 415 (1963).

⁹ In this way, the anti-advocacy provisions are more like, for example, the ban on the peaceful public display of "any flag . . . as a sign, symbol, or emblem

vocacy provisions could hardly have been more explicit in describing the suppression of ideas as their deliberate aim. *See* I.A. *infra*. Such a "censorial statute, directed at particular groups or viewpoints," *Broadrick v. Oklahoma*, 413 U.S. 601, 616 (1973), most plainly offends the rights and values the First Amendment was enacted to protect. For "[t]he essence of . . . forbidden censorship is content control. . . . There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

Second, the statute's flat censorship is a wholly gratuitous means of achieving the State's aims. For entirely independent of the anti-advocacy provisions struck down below, Oklahoma has in place a mechanism for permissibly dismissing teachers who in fact engage in unprotected conduct — *without* regard to the viewpoint they espouse. *See* Statement of the Case, *supra*, and I.B(2) *infra*. Thus the excision of the anti-advocacy provisions from the state's law leaves Oklahoma fully equipped to deal in a constitutional manner with *any* teacher — whether or not he or she has ever expressed pro-homosexual views — who disturbs orderly school administration, upsets the curricular policies of educational authorities, makes sexual advances to students, or engages in otherwise unprotected conduct or speech. Thus facial invalidation in this case in no way poses the drawback it does in the ordinary "overbreadth" case, for it furnishes no escape, even temporary, to any third parties whose conduct could constitutionally be punished.¹⁰ Accord-

of opposition to organized government" that was struck down in *Stromberg v. California*, 283 U.S. 359, 369-70 (1931). *See City Council v. Taxpayers for Vincent*, 104 S. Ct. 2118, 2124-25 & nn.12, 14 (1984).

¹⁰ The danger of such escape, pending a state's rewriting of an invalidated law in appropriately narrowed form, has caused the Court "hesitation," *New York v. Ferber*, 458 U.S. 747, 769 (1982), in finding statutes facially void for

ingly, facial invalidation is not "strong medicine" here at all. See *Broadrick v. Oklahoma*, 413 U.S. at 613.

In short, the anti-advocacy provisions are void for "overbreadth" not only in the sense that they silence a range of protected expression that is substantial in relation to the statute's legitimate sweep,¹¹ but also in the sense that "in all [their] applications [they] directly restrict[] protected First Amendment activity and do[] not employ means narrowly tailored to serve a compelling governmental interest." *Secretary of State v. Joseph H. Munson Co.*, 104 S. Ct. 2839, 2852 (1984). The decision below properly excises from Oklahoma law this needlessly speech-suppressing and viewpoint-stifling means for achieving the state's aims.

overbreadth. See, e.g., *Secretary of State v. Joseph H. Munson Co.*, 104 S. Ct. 1839, 1858 (Rehnquist, J., dissenting). Where, as here, that danger is absent, this reason to hesitate evaporates. See also note 46 *infra*.

¹¹ Clearly the anti-advocacy provisions are unconstitutionally overbroad in at least this sense, for they chill a vast range of plainly protected public expression (see I.A. *infra*), while hitting genuinely unprotected conduct, if at all, only fortuitously and redundantly (see I.B. *infra*). It should be noted, however, that this is not the sort of "overbreadth" case in which a party whose own conduct is unprotected seeks to challenge a statute on the ground that it might impermissibly reach the protected expression of others. See *New York v. Ferber*, 458 U.S. 747, 768-69 (1982). Rather, appellee here objects to the silencing of protected expression in which its own members wish to engage, and in which they fear to engage solely because of this statute. See Complaint, para. 4 (JA4). The deterrent effect of the anti-advocacy provisions on protected expression, which the Court below found "real and substantial," 729 F.2d at 1274 (App.7a), is thus raised directly rather than hypothetically here. Cf. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 & n.16 (1975) (theater manager claimed, in anticipatory challenge to overbroad anti-nudity ordinance, that his own activities were protected).

A. The Anti-Advocacy Provisions Impermissibly Censor Protected Public Expression.

1. Threatening job dismissal for "advocating," "promoting," or "encouraging" homosexual activity chills all speech expressing a viewpoint favorable to homosexuals.

From the time Section 6-103.15 was enacted until the date of the decision below, all who taught or wished ever to teach in Oklahoma's public schools, including members of appellee National Gay Task Force,¹² could voice views sympathetic to homosexuals or homosexual rights only at peril to their jobs. For the statute threatens with dismissal or rejection all teachers and prospective teachers who speak publicly about homosexuality in any way at all — unless they express such unmistakable disapproval of homosexuals as to preclude any charge that they are directly or indirectly "advocating," "encouraging," or "promoting" homosexual activity. Oklahoma has thus gone even further than simply "restrict[ing] expression because of its . . . subject matter, or its content," *Police Department of Chicago v. Mosley*, 408 U.S. at 95, or removing "an entire

¹² The standing of the National Gay Task Force to bring this challenge is undisputed before this Court. As the district court below held in denying appellant's motion to dismiss for want of standing, appellee sufficiently alleged that its members are suffering immediate or threatened injury because they "fear they could violate the statute through their rightful exercise of free expression," and are presently chilled by that fear from such expression. R.200 (Order of August 4, 1981). Appellee clearly has standing to represent its members in asserting this injury. See *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Indeed, this is the very sort of case in which an association must represent its members' claims if those claims are to be asserted at all. For so long as the anti-advocacy provisions stood, no individual Oklahoma teacher could afford to reveal, by becoming a named plaintiff, either association with the National Gay Task Force, or desire to express views chilled by the statute, without directly risking his or her job. Cf. *NAACP v. Alabama*, 357 U.S. 449, 459 (1958).

topic" from public debate, *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 537 (1980) — either of which would suffice to trigger "the First Amendment's hostility to content-based regulation," *id.* Beyond this, it has expressly subjected one specified viewpoint to official sanction,¹³ while giving the opposite viewpoint free rein.¹⁴

There can be no doubt that such a threatened sanction inhibits a vast range of speech and association.¹⁵ For teachers who seek

¹³ This Court has long made clear that conditioning public employment on the sacrifice of protected expression is as potent a sanction as punishing such speech directly. See *Connick v. Myers*, 103 S. Ct. 1684, 1687 (1983); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967).

¹⁴ Laws that "exclude one advocate from a forum to which adversaries have unlimited access," *Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875, 2890 (1983) (Stevens, J., concurring in the judgment), are especially repugnant to the First Amendment. See, e.g., *City Council v. Taxpayers for Vincent*, 104 S. Ct. 2118, 2128 (1984) (government may not "regulate speech in ways that favor some viewpoints or ideas at the expense of others"); *Perry Education Assn. v. Perry Local Educators' Assn.*, 103 S. Ct. 948, 957 (1983) (school board could not constitutionally seek "to discourage one viewpoint and advance another" by its rules of teacher access to interschool mail system); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978) ("where . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended"); *Madison School District v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167, 175-76 (1976) ("To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. . . . [W]hen the [school] board sits in public meetings to . . . hear the views of citizens, it may not . . . discriminate between speakers based on their employment, or on the content of their speech").

¹⁵ The freedom to associate is deeply enmeshed with the liberties of expression protected by the First Amendment. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-08 (1982); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295-99 (1981); *Bates v. Little Rock*, 361 U.S. 516, 522-23 (1960); *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958). Hereinafter, references to freedoms of speech threatened by the anti-advocacy provisions are intended to encompass the freedom of association wherever relevant.

conscientiously to "avoid the risk of loss of employment, and perhaps profession," can do so, as Justice White wrote for the Court over two decades ago, "only by restricting their conduct to that which is unquestionably safe." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). Does the teacher who expresses support for the repeal of the sodomy laws, who favors the enactment of anti-discrimination ordinances protecting homosexuals, or who vocally condemns violent attacks upon homosexuals¹⁶ thereby "advocate" homosexual activity? Does a teacher's practicing membership in a religious denomination that blesses membership by homosexuals, or active involvement in a political organization, such as the National Organization of Women, or the national Democratic Party,¹⁷ that expressly advocates civil rights for homosexuals, "promote" homosexual activity? Does a teacher "encourage" homosexual activity by discussing admiringly the lives or work of homosexual authors from Whitman to Wilde, from Cather to Keynes? "It is no answer to say that the statute would not be applied in such a case." *Keyishian v. Board of Regents*, 385 U.S. 589, 599 (1967). For — as President Reagan recognized in opposing a nearly identical law in California in November 1978, see note 3 *supra* — no teacher with a scrupulous regard for the law and a wish to retain

¹⁶ Oklahoma City public school teachers and administrators alike voiced just such condemnation during the months preceding the enactment of Section 6-103.15, in direct response to recruitment by the Ku Klux Klan of youths in Oklahoma City high schools for a "declared war on homosexuals" that in fact produced a series of violent skirmishes. See "National Klan leader terms city youth recruiting good," *Oklahoma City Times*, at 1 (Jan. 26, 1978).

¹⁷ On July 17, 1984, at its National Convention, the Democratic Party — by the unanimous vote of the delegations of all the states, including Oklahoma — adopted a platform containing the following provision: "All groups must be protected from discrimination based on race, color, sex, religion, national origin, language, age, or sexual orientation. We will support legislation to prohibit discrimination in the workplace based on sexual orientation." *The Report of the Platform Committee to the 1984 Democratic National Convention*, at 34 (1984).

his or her job, and no young person aspiring to a career in public school teaching, will dare to find out.¹⁸ Nor, of course, will such teachers venture forth to test the statute's boundaries by joining or contributing funds to lobbying organizations such as appellee National Gay Task Force, or by traveling to other cities — for example, in any of the 29 states that have long since decriminalized homosexual activity (*see note 24 infra*) — to take part in peaceful demonstrations on behalf of civil rights for homosexuals. Surely “[f]ree speech may not be so inhibited.” *Baggett v. Bullitt*, 377 U.S. at 372.

Contrary to appellant's suggestion (*see Appellant's Brief at 12-15, 36-37*), the four factors that are to be additionally “considered” by school authorities when “making the determination” that a teacher is “unfit” on the basis of pro-homosexual advocacy in no way thaw the chill on such expression.¹⁹ No

¹⁸ Because “no teacher can know just where the line is drawn” around advocacy of homosexual activity proscribed by Oklahoma's law, the anti-advocacy provisions are also void because unconstitutionally vague. *Keyishian v. Board of Regents*, 385 U.S. at 599; *see also id.* at 609 (“[w]here statutes have an overbroad sweep, just as where they are vague, . . . those covered by the statute are bound to limit their behavior to that which is unquestionably safe”). *See also Cramp v. Board of Public Instruction*, 368 U.S. 278, 286-88 (1961) (invalidating loyalty oath required of public school teachers); *Baggett v. Bullitt*, 377 U.S. at 366-73 (same). The impermissible vagueness of the anti-advocacy provisions furnishes an independent ground for affirming the judgment below, for even though the overbreadth ruling by the court below obviated any need for it to reach the vagueness issue with respect to the anti-advocacy provisions, those provisions were squarely challenged on that ground below in both the district court, *see Complaint para. 9(b)-(c) (JA6)*, and the court of appeals, *see Brief of National Gay Task Force*, filed below on October 19, 1982, at 18-20.

¹⁹ What appellant calls the fifth limiting factor — that pro-homosexual advocacy is proscribed only if expressed “in a manner that creates a substantial risk that [it] will come to the attention of school children or school employees,” Section 6-103.15(A)(2) — is no limiting factor at all. For *all* open advocacy obviously bears such a risk, by virtue of the very fact that it is public. This supposed “limit” thus at most frees only the most private and secretive expression, carefully closeted away from the reach of community ears. It leaves fully in place the statute's chill on the wide range of public expression far closer to the core of First Amendment protection.

teacher or would-be teacher can find much solace in the statute's suggestion that one who advocates, encourages, or promotes homosexual activity may perhaps be deemed fit notwithstanding such speech if school authorities should happen to find that individual's speech sufficiently harmless by reference to such factors. For these factors, which appellant calls “nexus requirements,” are in reality but an after-the-fact licensing scheme lodging such broad discretion in public school officials that their “every application” creates “an impermissible risk of suppression of ideas,” *City Council v. Taxpayers for Vincent*, 104 S. Ct. 2118, 2125 n.15 (1984), or of “selectively suppressing” disfavored “points of view,” *Police Department of Chicago v. Mosley*, 408 U.S. at 97.²⁰ Moreover, just as

²⁰ This Court has repeatedly invalidated discretionary licensing schemes containing “nexus” requirements just as explicit as those in the statute here. The provision that school authorities are to take into account whether pro-homosexual teacher advocacy “may adversely affect students or school employees,” for example, is plainly no less a grant of “uncontrolled discretion” over the exercise of First Amendment liberties, *Saia v. New York*, 334 U.S. 558, 562 (1948), than is a statutory provision that police chiefs must consider “annoyance or inconvenience of travelers upon any street or public places or of persons in neighboring premises” when deciding whether to issue permits for the use of loudspeakers in a community, *id.* at 559 n.1, *see id.* at 562 (“Annoyance at ideas can be cloaked in annoyance at sound”); a statutory provision that those licensing the solicitation of membership in dues-paying organizations must take into account “‘effects upon the general welfare of the citizens,’” *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958); or a statutory instruction that those licensing the distribution of handbills take into account whether the distributors will “importune or annoy the town's inhabitants,” *Schneider v. State*, 308 U.S. 147, 157-58 (1939). Yet the licensing schemes containing these provisions were flatly invalidated upon their face.

The Court has been especially sensitive to the danger that such discretionary licensing schemes, like the one at issue here, free public officials *notwithstanding their “nexus” provisions* to suppress the expression of viewpoints triggering prejudice or disfavor. *See, e.g., Kunz v. New York*, 340 U.S. 290, 292 (1951) (street sermonizing that “ridicule[s] and denounce[s] other religious beliefs”); *Procunier v. Martinez*, 416 U.S. 396, 415 (1974) (prisoner correspondence venting “unwelcome criticism” of prison officials”).

was the case in *Secretary of State v. Joseph H. Munson Co.*, 104 S. Ct. at 2853, the “possibility of a waiver” of the statute’s sanctions at the discretion of public authorities “may decrease the number of impermissible applications of the statute, but it does nothing to remedy the statute’s fundamental defect” — here, its censorial targeting of particular groups and viewpoints.²¹

2. The speech chilled by the anti-advocacy provisions is protected by the First Amendment, even when advanced by public school teachers.

Appellant concedes that the anti-advocacy provisions “preclude” and “proscribe[]” speech (*see, e.g.*, Appellant’s Brief at 11, 12); it simply argues that none of the speech proscribed is protected by the First Amendment. In support of this argument, appellant advances two theories: *first*, that advocacy of homosexual activity is unprotected *per se*; and second, that advocacy of homosexual activity, even if protected when engaged in by a private citizen, is *inherently* unprotected when engaged in by public school teachers. Both theories are wholly in error.

First, appellant asserts that Section 6-103.15’s flat viewpoint-based censorship is unobjectionable because speech ad-

²¹ In *Munson*, the challenged statute barred charitable organizations from spending more than 25% of funds they solicited on overhead. The state’s asserted aim was to prevent fraud. The Court found the fundamental defect of this statute to be its “mistaken premise that high solicitation costs are an accurate measure of fraud.” 104 S. Ct. at 2852. The fact that the statute expressly authorized a waiver of the percentage limitation where it would “effectively prevent a charitable organization from raising contributions,” *id.* at 2845, was held not to cure the statute’s impermissible prohibition of protected discussion and advocacy. The possibility that school officials might grant similar dispensation to *some* protected expression likewise supplies no cure here.

vocating, encouraging, or promoting homosexual activity is, *per se*, simply devoid of any legitimate public concern warranting First Amendment protection. Appellant suggests that such expression is unprotected because it refers to activity still deemed a crime by the Oklahoma legislature — even if the expression falls well short of imminently inciting action in violation of the criminal law.²² But it is simply too late in the day to venture such an argument. This Court has long since held that the First Amendment forbids the proscription of “mere [abstract] advocacy” of, or “mere expression of belief” in, even the criminal overthrow of the government by force and violence. *Keyishian v. Board of Regents*, 385 U.S. at 600-01. “[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to [unlawful] force and violence,” is . . . speech which our Constitution has immunized from governmental control.” *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (per curiam) (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961)).²³ And, absent advocacy directly inducing imminent lawless action, it has long been settled that the mere “undifferentiated fear or apprehension” that possible illegal activity might be encouraged is insufficient to overcome First Amendment rights, even in our public schools. *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 508 (1969).

If such protection is accorded even speech advocating criminal terrorism and sabotage against our government, clearly

²² *See, e.g.*, Appellant’s Brief at 33-34; *see also id.* at 29-30 (conceding that the statute is not limited to barring speech inciting imminent unlawful activity). This posture is shared by the dissenting judge below, who states, “Political expression and association is at the very heart of the First Amendment. The advocacy of a practice as universally condemned as the crime of sodomy hardly qualifies as such.” 729 F.2d at 1276-77 (App.11a) (Barrett, J., dissenting).

²³ *See also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982); *Healy v. James*, 408 U.S. 169, 188 (1972); *Whitney v. California*, 274 U.S. 357, 376-77 (1927) (Brandeis, J., concurring).

no less can be accorded speech abstractly advocating, encouraging, or promoting intimate and consensual homosexual activity which, although still deemed a crime in Oklahoma, has been decriminalized by over half the states.²⁴ The advocacy of activities one generation calls criminal may well be a vehicle for profound political and social change in the next. Thus, prior to this Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), expression of support for interracial marriage was advocacy of activity criminal in the Commonwealth of Virginia. Prior to this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), expression favoring freedom to choose abortion was advocacy of activity criminal in nearly all our states. And, prior to the adoption of the Nineteenth Amendment, to speak in favor of suffrage for women was to advocate activity amounting to the federal offense of "knowingly, wrongfully, and unlawfully voting."²⁵ To treat homosexual activity as an offense so heinous that *its* advocacy may be penalized in circumstances where advocacy of *other* currently criminal conduct would be protected, as do appellant and the dissent below,²⁶ is to ignore the central teaching of the First Amendment that no majority in this country may silence those who, however law-abiding, wish to express profound disagreement

²⁴ See Rivera, *Book Review*, 132 U. Pa. L. Rev. 391, 410-11 & nn.125-32 (1984). As early as 1955, the American Law Institute decriminalized private homosexual activity in its Model Penal Code. See *id.* at n.125.

²⁵ The great suffragist Susan B. Anthony was prosecuted, convicted, and jailed for this offense after casting a ballot in 1872. See Griffith, *In Her Own Right: The Life of Elizabeth Cady Stanton* 154 (1984).

²⁶ See Appellant's Brief at 29-30 (suggesting that the dangers of pro-homosexual teacher advocacy are "so grave" that such speech may be suppressed even where it falls well short of incitement under *Brandenburg*); see also 729 F.2d at 1277 (App. 12a) (dissenting opinion) ("[T]he advocacy of violence, sabotage and terrorism . . . held in *Brandenburg* . . . to be protected speech unless demonstrated as directed to and likely to incite or produce such action *did not* involve advocacy of a crime *malum in se*. . .").

with the majority's rules of conduct, by advocating their repeal or by expressing support for the acts such rules currently outlaw and the groups such rules currently disfavor.

Second, appellant argues that, even if advocacy sympathetic to homosexuals were generally protected, the anti-advocacy provisions "proscribe[] no speech which is constitutionally protected *to public school teachers*" (Appellant's Brief at 11 (emphasis added); see *id.* at 36). This argument suggests that *teachers'* speech sympathetic to homosexuals is somehow *inherently* unprotected.²⁷ But no ruling of this Court remotely supports this suggestion.

To be sure, this Court has recognized that the speech rights of public employees are not absolute and, in particular, that a state may curtail public employee speech that directly impairs the interest of the state in promoting "the efficiency of the public service it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Furthermore, in recognition of that state interest, the Court has held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest," *Connick v. Myers*, 103 S. Ct. 1684, 1690 (1983), that speech is simply "unprotected in the sense that employment-related sanctions may be imposed on the basis of such statements," *Bose Corp. v. Consumers Union*, 104 S. Ct. 1949, 1962 n.22 (1984).

But this Court has repeatedly made clear that speech by public school teachers *as citizens commenting on matters of public concern* enjoys the same protection as does "a similar contribution by any member of the general public," *Pickering v. Board of Education*, 391 U.S. at 572-73 — *unless* that speech manifestly disrupts the efficiency of the educational

²⁷ To the extent that this argument suggests instead that such speech even by teachers is generally protected, but that state interests here simply outweigh that protection, it is dealt with in I.B. *infra*.

process.²⁸ For public speech on issues of “political, social, or other concern to the community” — when uttered by private citizen and public school teacher alike — occupies the very “‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection.” *Connick v. Myers*, 103 S. Ct. at 1690, 1689 (quoting *NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409, 3426 (1982)). This Court has thus vigilantly struck down state laws that “suppress the rights of public employees to participate in public affairs” by threatening discharge for joining associations, even those that public officials might find “‘subversive.’” *Id.*²⁹ And this Court has likewise consistently overturned dismissals of school teachers for speaking out on matters of legitimate public concern, even when that speech was sharply critical of educational policies or practices.³⁰

There can be no question that Oklahoma’s anti-advocacy provisions are targeted at speech by teachers speaking as citizens on matters of public concern, not at speech on matters of mere private interest. Public debate about the decriminalization of homosexual activity; about the wisdom of enacting civil rights protections for those who engage in homosexual

²⁸ See, e.g., *Givhan v. Western Line School District*, 439 U.S. 410, 414 (1979); *Abood v. Detroit Board of Education*, 431 U.S. 209, 230-32 (1977) (public school teachers are, in general, as free under the First Amendment as are their private counterparts to engage in public “expression about philosophical, social, artistic, economic, literary, or ethical matters — to take a nonexhaustive list of labels,” whether or not such speech is properly describable as “political”); see also *Keyishian v. Board of Regents*, 385 U.S. at 602-04.

²⁹ See, e.g., *Keyishian v. Board of Regents*, 385 U.S. at 605-10 (rights of teachers); *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (same); *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952) (same).

³⁰ See, e.g., *Pickering v. Board of Education*, 391 U.S. at 571-72 (holding that teacher’s criticism of school administrators’ allocation of funds as between athletics and academics is protected speech); *Givhan v. Western Line School District*, 439 U.S. at 412-13, 415-16 (holding that teacher’s criticism of school’s employment policies as racially discriminatory is protected speech).

activity; and about how such activity should be regarded as a matter of medicine, morals, and culture, has occupied an important and highly visible place on the legislative agendas of countless state and local governments in our country in the recent past. Such issues have likewise captured the attention of our national political parties and news media. As Justice Tobriner wrote half a decade ago, “the subject of the rights of homosexuals incites heated political debate today,” and “[t]he aims of the struggle for homosexual rights . . . bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities.” *Gay Law Students Ass’n v. Pacific Tel. & Tel.*, 595 P.2d 592, 610 (Cal. 1979).

Neither appellant nor the Attorney General of Oklahoma, writing for the state as amicus curiae, denies that the advocacy proscribed by Section 6-103.15 touches matters of public interest;³¹ they simply assert that such advocacy, precisely *because* of its controversial content, is *inherently* disruptive of orderly educational process in the public schools.³² The short

³¹ Indeed, the Attorney General candidly concedes that the Oklahoma law applies to “advocacy of issues which are controversial,” to “advoca[cy] of social causes,” and to “‘gay rights’ activis[m]” by teachers. See Brief of the State of Oklahoma as Amicus Curiae (hereinafter, “Oklahoma Brief”), at 3-4, 20, 22.

³² See Appellant’s Brief at 34-35 (teacher advocacy of homosexual activity, “[w]hen it comes to the attention of other teachers or co-workers, . . . is likely to produce sufficient controversy, suspicion, and mistrust so as to threaten employee discipline, co-worker harmony, and that personal loyalty and confidence requisite to particularly close employee relationships”); see also *id.* at 29-30 (when such advocacy comes to the attention of students, it disrupts their “normal process of social integration”). See Oklahoma Brief at 3-4, 20 (“A state should be permitted to require that a public school teacher remain neutral with regard to public advocacy of issues which are controversial and which may [thus] promote strife within a school system”). In light of this view held by the relevant public authorities of Oklahoma, it is even clearer why no teacher attached to his or her job will venture even arguably proscribed pro-homosexual speech in the hope of perhaps gaining administrative reprieve under the so-called “nexus requirements.” See I.A. *supra*.

answer to this suggestion, however, is that public expression in our constitutional system does not lose its protection merely because exposure to its content may be offensive to some who hear it.³³ As the Chief Justice recently stated for a unanimous Court in another context, "The Constitution cannot control such prejudices but neither can it tolerate them" as grounds for overriding a constitutional right. *Palmore v. Sidoti*, 104 S. Ct. 1879, 1882 (1984) (public hostility to interracial families cannot justify racially discriminatory custody award). The First Amendment forbids any state to declare inherently unprotected a category of advocacy which, however controversial, falls into none of the narrow and well-defined classes of expression this Court has deemed unprotected. It likewise bars any state from defining a category of public employee speech, however controversial, as inherently disruptive of the employee's public workplace — even if that workplace is a school. The *Pickering* balance, on the contrary, must be struck on a case-by-case basis, *see* 391 U.S. at 568, with an eye to the disruptive effects of speech, *not* to the *viewpoint* it expresses.

B. The Statute's Flat Censorship Is Wholly Unnecessary To Serve, And Does Not Closely Fit, Any Legitimate State Interest In Preventing Incitement Of Criminal Activity Or Disruption Of The Education Of Children In The Public Schools.

Appellant seeks at length to justify the anti-advocacy provisions as appropriately and narrowly tailored to serve the state's

³³ *See, e.g., Carey v. Population Services International*, 431 U.S. 678, 701 (1977); *Healy v. James*, 408 U.S. 169, 187-88 (1972); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("[a] function of free speech under our system is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger").

special interests in protecting school children and in avoiding disruption to the educational process. *See, e.g.,* Appellant's Brief at 29-31, 34-35; *see also id.* at 23-26. The anti-advocacy provisions, however, create *not* a viewpoint-neutral ban on conduct that incites or disrupts and happens to do so through the vehicle of speech, but a viewpoint-specific burden on speech that might happen to incite or disrupt. And this Court has *never* held that content-based and viewpoint-stifling regulations of teacher speech can survive the scrutiny of the First Amendment if the legitimate ends served by such regulations could be achieved by less restrictive, viewpoint-neutral means. On the contrary, the principle that government must not favor certain viewpoints over others in its regulation of speech — even speech by public employees when they venture as citizens into the public arena — means at the very least that incitement or disruption must be neutral triggers, not substantively slanted excuses, for the invocation of government's power to penalize speech.

Indeed, it is precisely in the context of public educational employment that this Court has repeatedly stated that, "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). "Precision of regulation must be the touchstone," *NAACP v. Button*, 371 U.S. 415, 438 (1963), *above all* in the public schools, where any unnecessary inhibition of freedom of thought, speech, or inquiry "has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice," for teachers are, "from the primary grades to the university . . . the priests of our democracy." *Wieman v. Updegraff*, 344 U.S. 183, 195, 196 (1952)

(Frankfurter, J., concurring).³⁴ Far from regulating with precision, however, the anti-advocacy provisions are both ill-fitted to the state's asserted goals, and wholly gratuitous to achieving them.

1. The anti-advocacy provisions sweep far beyond speech that incites or disrupts.

As appellee has never disputed, the state is entirely free under the First Amendment to proscribe teachers' advocacy that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. at 447. As appellee has likewise never disputed, the state is entirely free under the First Amendment to deny public employment to a teacher whose public expression, even on a matter of public concern, can be shown to have "impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Pickering v. Board of Education*, 391 U.S. at 572-73. The anti-advocacy provisions, however, are in no way tailored to fit these legitimate state interests.³⁵

³⁴ As Justice Frankfurter went on to say, in words most apposite here, "It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them." 344 U.S. at 196. Appellant's claim that Oklahoma's censorship of its teachers' speech somehow promotes respect among students for our "governmental process" (see Appellant's Brief at 34) gets these fundamental principles entirely backwards.

³⁵ Appellant and the State Attorney General do assert one interest that the anti-advocacy provisions arguably fit closely: an interest in ensuring that school

First, even appellant apparently concedes — as the language and history of Section 6-103.15 plainly require it to concede — that nothing in the statute limits the reach of its anti-advocacy provisions to speech by public school teachers that will incite "impressionable school children" to "imminently commit the crime of homosexual sodomy." Appellant's Brief at 29-30.³⁶ Thus the provisions indisputably apply to speech of a sort generally protected by the First Amendment as construed in *Brandenburg v. Ohio*.

Second, the anti-advocacy provisions apply fully even to the sorts of teacher speech that the First Amendment, as construed in *Pickering*, would protect because that speech disrupts neither the classroom nor the efficient administration of the schools. See I.A(2) *supra*. Appellant's entire argument that the provisions do *not* sweep so broadly stands or falls with its claim that the statutory criteria it labels "nexus requirements" —

children be carefully shielded from teachers whose expressed opinions fail to fit an orthodox mold the state deems consistent with "normal . . . social integration" (Appellant's Brief at 30) and complete "political neutrality" (Oklahoma Brief at 20). But *that* interest is flatly illegitimate. For, while teachers are indisputably "role model[s]" who influence the "perceptions," "values," and "attitudes" of students, see *Ambach v. Norwick*, 441 U.S. 68, 79 (1979), "probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing," *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 641 (1943). Indeed, this Court has always repudiated states' claims that they may conduct their schools so as to "foster a homogeneous people," *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

³⁶ Indeed, nothing in the statute even limits its censorship to speech that is heard by *children* at all, for a teacher may be fired on the basis of speech likely to come *solely* to the attention of adult "school employees." See Section 6-103.15(A)(2). Under the First Amendment, however, no state can "reduce the adult population . . . to [hearing] only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). And this statute is plainly in *no* way limited to speech whose very production involves the *abuse* of children, as was the statute upheld in *New York v. Ferber*, 458 U.S. 747, 756-57 (1982).

notwithstanding their facial irrelevance to teachers' job competence — narrow the statute to speech unprotected under *Pickering*.³⁷

Far from limiting the statute to the disruptive speech unprotected under *Pickering*, however, these criteria leave schools entirely free to fire teachers, and to reject teacher applicants, on the basis of a broad range of speech that neither impedes their efficacy in the classroom nor impairs the efficiency of the school's administrative hierarchy. Clearly the fact that a teacher speaks in a manner open and public enough for the school's students and employees to find out about the teacher's views in no way determines whether the speech is disruptive. See note 19 *supra*. Nor does the fact that the speech "may adversely affect" students or co-workers in some unspecified way (the first factor) guarantee its disruptiveness; such a flimsy "standard" could easily be triggered by the slightest personal offense or objection taken by the most sensitive hearer. Cf. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (city control of traffic obstructions may not depend on "whether or not a police-

³⁷ The statute provides that "[t]he following factors will be considered in making the determination whether the teacher . . . has been rendered unfit:

1. The likelihood that the [expression] may adversely affect students or school employees;
2. The proximity in time or place of the [expression] to the teacher's . . . official duties;
3. Any extenuating or aggravating circumstances; and
4. Whether the [expression] is of a repeated or continuing nature which tends to encourage or dispose school children toward similar [expression, or toward public homosexual activity]."

Appellant also labels as a "nexus" requirement the fact that speech subject to the anti-advocacy provisions must be made in a "manner" likely to "come to the attention of school children or school employees," see Section 6-103.15(A)(2).

man is annoyed"). Proximity to the school itself (the second factor) need have nothing at all to do with the disruptiveness of speech. Cf. *Police Department of Chicago v. Mosley*, 408 U.S. at 99-101. Neither does the frequency of its utterance or its persuasiveness (the fourth factor).³⁸ Finally, to hold speech hostage to the standardless discretion of administrators to decide what circumstances are "extenuating or aggravating" (the third factor), cf. *Kolender v. Lawson*, 103 S. Ct. 1855, 1858-59 (1983), is little better than a licensing scheme permitting the selective suppression of disfavored points of view. See *Police Department v. Mosley*, 408 U.S. at 97; see also note 20 *supra*.

None of these supposedly "narrowing" criteria even remotely tracks the legitimate interest of the state in preventing actual disruption of the educational process,³⁹ and so the anti-advocacy provisions fail to respect "the boundaries of . . . speech etched by the Constitution itself," *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978). For the anti-advocacy provisions — pegged as they are, despite the "nexus requirements," to the *viewpoint* rather than the *effects* of the speech proscribed — cannot themselves distinguish such instances of disruptive advocacy from pro-homosexual advocacy that is fully protected by the First Amendment, even in the public school context, because it causes *no* genuine disruption.

³⁸ Indeed, far from being a narrowing device, this factor actually aggravates the statute's affront to the First Amendment. To count as additional evidence of a teacher's "unfitness" the degree to which his or her speech "tends to encourage or dispose children toward similar conduct," under *this* statute, is to penalize speech more severely the more it serves the protected purpose of promoting dialogue, for in *this* statute, encouraging "conduct" means encouraging students' speech that might be deemed sympathetic to homosexuality.

³⁹ Likewise, the "nexus requirements" map out no hard "core of easily identifiable and constitutionally proscribable conduct," *Secretary of State v. Joseph H. Munson Co.*, 104 S. Ct. at 2852, that could save the anti-advocacy provisions from substantial overbreadth.

Cf. Secretary of State v. Joseph H. Munson Co., 104 S. Ct. at 2852.⁴⁰

The fact that the anti-advocacy provisions might *happen* to sweep in some imaginable instances of pro-homosexual advocacy that could legitimately be penalized because disruptive of a school's educational mission,⁴¹ is thus "little more than fortuitous," *id.* at 2853. Indeed, the fact that an improperly censorial statute's blows might happen to fall on some unprotected utterances has never been sufficient to save such a statute from facial invalidation by this Court.⁴²

Thus, in *Procunier v. Martinez*, 416 U.S. 396 (1974), the Court struck down on their face previously unconstrued state prison regulations censoring prisoners' correspondence expressing grievances or political, racial, religious or other views which prison authorities might deem inflammatory or otherwise inappropriate. Such censorship was held wholly unnecessary to

⁴⁰ In *Munson*, this Court invalidated a statute it found similarly incapable of distinguishing between those charities whose expenses exceeded 25% of their solicitation income for unprotected reasons, such as fraud or mismanagement, from those whose expenses were high for protected reasons, such as the importance to their enterprise of dissemination of information. *See* 104 S. Ct. at 2852.

⁴¹ For example, if a group of teachers vocally and demonstratively protested a high school principal's refusal to let a male student take another boy to the senior prom, *cf. Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980) (Pettine, J.), and if uproar and mounting violence in the school community ensued, the situation might present a case for constitutionally permissible sanctions against such genuinely disruptive speech. *But see id.* (holding undifferentiated fear of disturbance insufficient to overcome student's First Amendment rights). Of course, school authorities would be fully able to apply sanctions against any similarly disruptive teacher protest that might be mounted concerning issues wholly unrelated to homosexuality — without any need to create a viewpoint-based analogue to Section 6-103.15. *See* II.B(2) *infra*.

⁴² Whatever degree of overbreadth might be required to doom an otherwise acceptable law, it has never been the case that an otherwise void law may be rescued by a showing that some of the acts or utterances it reaches are constitutionally unprotected.

the furtherance of substantial governmental interests in security, order, and rehabilitation. *Id.* at 415-16. It did not save the statute that some of the letters censored under the regulations might in fact threaten such interests, and might thus be legitimately proscribable under an appropriately narrowed policy. *See id.* at 416 (some of the letters subject to censorship might have encouraged prison violence). In *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), an ordinance banning the showing of nudity on drive-in movie screens was invalidated on its face for sweeping "far beyond the permissible restraints on obscenity," *id.* at 208 — notwithstanding the obvious fact that the ordinance also swept some banable obscenity within its reach. And, in *Virginia Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976), the Court struck down facially a previously unconstrued state statute deeming it unprofessional conduct for a pharmacist to advertise his drug prices — notwithstanding the fact that this prohibition on speech would no doubt keep some unprotected deceptive advertising out of the public domain along with a vast range of protected truthful messages, *see id.* at 771.

In each of these cases, as here, the fatal vice of the law in question was that its restriction of speech on the basis of content or viewpoint in no way adhered, as the First Amendment requires, to the boundaries of legitimate government interests.⁴³

⁴³ Indeed, the anti-advocacy provisions violate those boundaries not only by being overinclusive, as demonstrated above, but also by being underinclusive. The state, though *assertedly* seeking to protect children from disruptive exposure to those who might be perceived to advocate criminal activity, has singled out pro-homosexual advocacy while subjecting *no* other advocacy — *e.g.*, of heterosexual sex offenses — to sanction, except by way of the general teacher-competence statute, Section 6-103. Such specific targeting of only *one* of the types of speech that implicate a state interest belies the state's sincerity in serving that interest. *Cf. First National Bank v. Bellotti*, 435 U.S. at 793 (where a ban on corporate speech bans expenditures on referenda but not on lobbying or other political causes, "the fact that a particular kind of ballot ques-

And in each of those cases, as here, those interests were wholly capable of advancement by less restrictive, content- or viewpoint-neutral means.

2. Viewpoint-neutral alternatives to the anti-advocacy provisions are readily available to the state.

The Tenth Circuit's invalidation of the anti-advocacy provisions leaves the State of Oklahoma fully free to prevent disruption of the educational process in its public schools, and to protect the physical and mental welfare of its students — just as this Court's invalidation of the prison censorship scheme in *Procunier* left the state free to prevent disorder in its prisons; as this Court's invalidation of the anti-nudity ordinance in *Erznoznik* left the state free to prevent the publicly visible showing of obscene films; and as this Court's invalidation of the anti-advertising ban in *Virginia Board of Pharmacy* left the state free to prevent false or misleading pharmaceutical advertising. All that the Constitution requires is that such unprotected speech be narrowly and neutrally targeted.

In fact, the decision below left in place, in the form of unchallenged Section 6-103,⁴⁴ a less censorial mechanism amply authorizing discharge of any public school teacher who actually incites criminal conduct or causes disruption in the schools — regardless of the substantive content or viewpoint expressed.

tion has been singled out for special treatment" calls into question the sincerity of the state's asserted interest in generally "protecting shareholders").

⁴⁴ See Statement of the Case, *supra*. In addition to Section 6-103, Oklahoma's criminal laws against the solicitation, molestation, or corruption of children furnish the State clear protection against any teacher — homosexual or heterosexual — who were ever to so harm his charges. See, e.g., Okla. Stat., Title 21, Sections 856 & 857(4)(a), (e), (f) (contributing to delinquency of minors); Section 1123 (lewd or indecent proposals to child under 16).

Any genuinely unprotected speech that might have been reached by the excised anti-advocacy provisions would surely subject a teacher to dismissal under that mechanism.⁴⁵ But it is *only* for actually causing or directly threatening disruption, and not for the viewpoint expressed, that a teacher's speech may ever be so penalized. And the very redundancy of the anti-advocacy provisions insofar as they could ever be applied permissibly — *i.e.*, the very fact that some of the conduct these provisions might constitutionally reach is *already* subject to the state's control — simply confirms the ready availability of less drastic means by which Oklahoma may achieve its legitimate aims. The Tenth Circuit's surgical excision of the anti-advocacy provisions from Oklahoma law thus leaves the state in no way powerless to defend its legitimate interests.⁴⁶

⁴⁵ If a teacher spoke out in such a way as to genuinely threaten his charges — for instance, by publicly endorsing the seduction of young children — school authorities would hardly need the invalidated portion of Section 6-103.15 to authorize that teacher's dismissal — whether the threat were homosexual or heterosexual. Such advocacy would surely raise questions of competence and moral turpitude under Section 6-103. Cf. *Hollon v. Pierce*, 257 Cal.App.2d 468, 64 Cal. Rptr. 808 (3d Dist. 1967) (city may discharge school bus driver who believes in the religious sacrifice of children).

⁴⁶ Indeed, as one commentator has argued, facial invalidation of a job disqualification scheme such as Oklahoma's *never* "leave[s] the government powerless to protect itself," for unlike the invalidation of a *criminal* statute on overbreadth grounds, which effectively immunizes even unprotected activity committed prior to the enactment of a new valid criminal law, see, e.g., *Gooding v. Wilson*, 405 U.S. 518 (1972), "the elimination of overbroad schemes for screening employees or professionals does not prevent immediate and hoc screening." Bogen, *First Amendment Ancillary Doctrines*, 37 Md. L. Rev. 679, 706 (1978).

II. ABSTENTION WOULD BE WHOLLY INAPPROPRIATE IN THIS CASE.

Appellant, never having urged *Pullman*⁴⁷ abstention below,⁴⁸ does not squarely urge it even now, but speaks vaguely of “dismissal or abstention, with certification of any residually relevant question of law to the Supreme Court of Oklahoma.” Brief of Appellant at 16; *id.* at 8, 17-18. But the only state-law ruling that Appellant proposes is one that would in no sense “render adjudication of the federal question unnecessary,” *Hawaii Housing Authority v. Midkiff*, 104 S.Ct. 2321, 2327 (1984), for Appellant speaks only of “the possibility that the Oklahoma Supreme Court would interpret the statute to require the presence of at least one of the four nexus factors.” Brief of Appellant at 17. Yet, as demonstrated above, those factors are utterly incapable of shoring up the statute’s basic flaws — its facial burdening of pure speech that neither incites nor disrupts nor falls within any other established category of unprotected utterance, and its explicit burdening of speech based upon the viewpoint being expressed.

Indeed, given the vagueness of the statute’s over-inclusive and viewpoint-targeted proscription (*see* note 18, *supra*) and the amorphous character of the discretionary, *post hoc* licensing

⁴⁷ *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496, 500-502 (1941).

⁴⁸ Failure to raise the possibility of abstention in any lower court may itself constitute a ground on which this Court may decline that option. *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315 n.11 (1980) (per curiam) (“since [abstention] was not raised in the Court of Appeals, we decline the invitation”); *see also Chicago v. Atchison, Topeka & Santa Fe Railway Co.*, 357 U.S. 77, 84 (1958); *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 329 (1964); *cf. Lehman Bros. v. Schein*, 416 U.S. 386, 393, 395 (1974) (Rehnquist, J., concurring) (Court should hesitate to accept suggestion even of less burdensome alternative of certification of questions to the state’s highest court, when suggestion was not made to trial or appellate court below).

scheme of which that proscription is a part (*see* text at note 20 *supra*), it is most unlikely that any single state court adjudication — even if a relevant state proceeding were already pending — could eliminate the statute’s constitutional infirmities. In fact, no relevant state proceeding is underway. But, even if one were, “it would require ‘extensive adjudications under the impact of a variety of factual situations,’ to bring the challenged statute . . . ‘within the bounds of permissible constitutional certainty.’” *Procunier v. Martinez*, 416 U.S. at 401 n.5 (quoting *Baggett v. Bullitt*, 377 U.S. at 378).

In such situations, abstention is peculiarly “inappropriate,” *Babbitt v. Farm Workers*, 442 U.S. 289, 308 (1979), for its consequence would be to compel all to whom the statute’s literal language plainly extends — here, all public school teachers and would-be teachers in Oklahoma — to “forswear all activity arguably within the scope of the [statute’s] vague terms,” *Procunier v. Martinez*, 416 U.S. at 401 n.5; as the only safe course to follow absent authoritative prior guidance as to just which utterances, or which expressive or associational activities, in which settings, would only *apparently* jeopardize their jobs. That “[f]ree speech may not be so inhibited,” *Baggett v. Bullitt*, 377 U.S. at 372, counsels against abstention as an *institutional* matter no less than it counts against the statute’s validity as a *substantive* matter. *See also Cramp v. Board of Public Instruction*, 368 U.S. 278, 287 (1961); *Smith v. California*, 361 U.S. 147, 151 (1959); *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

To be sure, a state court *could* always hold — despite the manifestly broader language of the statute and the Oklahoma Attorney General’s ambitious defense of its full sweep⁴⁹ —

⁴⁹ The Oklahoma Attorney General contends that the statute enables school boards to exclude from the teaching profession “‘gay rights’ activists,” Brief of Oklahoma at 22, and any teacher who takes a stand on “issues which are con-

that the statute would thenceforth extend *only* to demonstrably inciting, disruptive, or otherwise unprotected teacher utterance, and only in a viewpoint-neutral manner. In effect, a state court *could* rewrite the statute altogether if it chose to do so.⁵⁰ But if the statute's terms "are not susceptible of a narrowing construction . . . because a rewriting of the [law] would be necessary," *Erznoznik v. City of Jacksonville*, 422 U.S. 216 & n.15, abstention is inappropriate. The "bare . . . possibility" of judicial rewriting is insufficient to invoke *Pullman*. See *Hawaii Housing Authority v. Midkiff*, 104 S.Ct. at 2327. Requiring that federal courts await the possibility of such state court actions even for statutes like this would permit the impermissible chill of protected speech to persist, and to cause irreparable harm, for months or years until eventually thawed by the state judiciary — effectively negating Congress' design, through 42 U.S.C. § 1983, to provide an independent federal

troverial, *id.* at 3-4, whether inside or "outside the classroom," *id.* at 24, as an exercise of the state's legitimate interest in purging the classroom of "advocates of social causes," *id.* at 20.

⁵⁰ Such wholesale judicial amendment of legislation, however, is contrary to the practice of the Oklahoma Supreme Court. That tribunal "will not place such a strained construction on the plain words of [an act] that [the court would] judicially impose a different meaning than the legislature intended," *Thornton v. Woodson* 570 P.2d 340, 342 (S.Ct. Okl. 1977), nor will it "read into the statute exceptions which are not made by the legislative body." *Grand River Dam Authority v. Oklahoma*, 645 P.2d 1011, 1018 (S.Ct. Okl. 1982). Yet any judicial construction that could make Section 6-103.15 constitutional by limiting the grounds for dismissal to speech that disrupted the school or incited imminent lawless conduct would necessarily render the statute redundant of Section 6-103 — and the Oklahoma Supreme Court will not presume the legislature to enact surplusage, *Hunt v. Washington Fire & Marine Insurance Co.*, 381 P.2d 844, 847 (S.Ct. Okl. 1963); *Sisk v. Sanditen Investments Ltd.*, 662 P.2d 317, 320 (Okl. App. 1983). Moreover, no such *narrowing* state court construction could cure the statute's gross *underinclusiveness*, see note 43 *supra*.

forum as an *alternative* to state courts for the prompt and effective protection of federal constitutional rights.⁵¹

The *Pullman* doctrine "'is not a broad encyclical commanding automatic remission to the state courts of all federal constitutional questions arising in the application of state statutes,'" *Zwickler v. Koota*, 389 U.S. 241, 250-51 (1967) (quoting *United States v. Livingston*, 179 F.Supp. 9, 12 (E.D.S.C. 1959), *aff'd*, *Livingston v. United States*, 364 U.S. 281 (1960)) — *especially* "when, as in this case, the attack upon the statute on its face is for repugnancy to the First Amendment. In such a case to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." 389 U.S. at 252; see also *Procunier v. Martinez*, 416 U.S. at 404 (abstention exacts a "high cost . . . when the federal constitutional challenge concerns facial repugnance to the First Amendment"). In that event, "free expression — of transcendent value to all society, and not merely to those exercising their rights — might be the loser." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

Even if it involved no delay and no interim suppression of protected speech, abstention under these circumstances would remain a meaningless calisthenic. This Court has "frequently emphasized that abstention is not to be ordered unless the statute is . . . *obviously* susceptible of a limiting construction." *Hawaii Housing Authority v. Midkiff*, 104 S.Ct. at 2327 (em-

⁵¹ It has long been settled that, in § 1983 suits, "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape*, 365 U.S. 167, 183 (1961). "When federal claims are premised on 42 U.S.C. § 1983 . . . [this Court] ha[s] not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974). *Accord*, *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 501-06 (1982).

phasis added) (citing *Zwickler v. Koota*, 389 U.S. at 251 n.14). "[W]here as here, [Appellant] offers several distinct justifications for the ordinance in its broadest terms, there is no reason to assume that the ordinance can or will be decisively narrowed." *Erznoznik v. City of Jacksonville*, 422 U.S. at 217.⁵²

Nor does any legitimate state concern point toward abstention here. Unlike circumstances in which a federal court's facial invalidation of a state statute immunizes constitutionally unprotected conduct from state control until a narrowing rehabilitation of the voided law is later provided by a state court, no such windfall for unprotected behavior, and no such costs to legitimate state interests, are realistically risked by non-abstention in this case. For, as has been shown above, the body of state law left fully intact by the decision below *already* provides the state with whatever tools an adequately narrowed version of the invalidated provision could add. Where, as here, the provisions struck down by a federal court are wholly *redundant* insofar as they might reach unprotected speech, the high costs of abstention are demonstrably not worth incurring.

But even if this Court entertains doubts as to the meaning of relevant aspects of state law, in no event should Appellee and its members be required to pursue protracted proceedings afresh, climbing the ladder of the state's judicial system from the bottom rung up simply to give that system an opportunity

⁵² For example, the Attorney General insists that the state may force its teachers to remain silent on "controversial" issues, Brief of Oklahoma at 3-4, and abstain from the "advoca[cy] of social causes," *id.* at 20. Appellant Board of Education similarly maintains that any advocacy that falls under the ban of the Oklahoma law, including advocacy of equal civil rights for homosexuals, "further[s] no important political or social community interest," and is entitled to "little — if any — First Amendment protection, *even if uttered by a member of the citizenry as a whole.*" Brief of Appellant at 33-34 (emphasis in original).

to hold, perhaps years hence, precisely what the federal court below has quite properly held already.⁵³

Conclusion

At issue in this case is not the state's authority to protect and educate its children or to enforce criminal laws against homosexual acts, but solely its power to censor public speech directly or indirectly sympathetic to homosexuals by all who would teach the state's youth. Whatever one's views about state power over personal conduct in this controversial realm, few lessons the state could impart would be less compatible with our constitutional ideals than the lesson that censorship

⁵³ Thus, if this Court were to deem it necessary to obtain authoritative guidance from Oklahoma's courts on the precise scope of Section 6-103.15, the case should not be remanded for abstention by the courts below while Appellee initiates a new lawsuit in the lower state courts. Rather, any pertinent state-law questions should be certified directly by this Court to the Oklahoma Supreme Court as provided in 20 Okla. Stat. Section 1602. See Brief of Appellant at 16. No remand for this purpose would be needed, for the Oklahoma certification statute expressly provides that the state's highest court "may answer questions of law certified to it by the Supreme Court of the United States." This Court has often employed such direct certification procedures, *see e.g. Zant v. Stephens*, 456 U.S. 410, 414-17 (1982); *Elkins v. Moreno*, 435 U.S. 647, 668-69 (1978); *Aldrich v. Aldrich*, 375 U.S. 249, 251-52 (1963); *Dresner v. Tallahassee*, 375 U.S. 136, 138-39 (1963) (per curiam) — procedures which, no less than abstention, "help[] build a cooperative judicial federalism," *Bellotti v. Baird*, 428 U.S. 132, 151 (1976) (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)). While abstention invariably delays litigation significantly and multiplies its cost without even guaranteeing eventual resolution of state law questions by the state's highest court, *see Field, The Abstention Doctrine Today*, 125 U.Pa.L.Rev. 590, 604 (1977), certification at least achieves some efficiency and certitude by bypassing lower state court litigation and going directly to the source, thereby saving "time, energy, and resources," *Bellotti v. Baird*, 428 U.S. 150-51; *see Lehman Bros.*, 416 U.S. at 391.

of those views — and the stark silence such censorship imposes — would sadly convey. Because the court below simply recognized this enduring truth when it excised such gratuitous censorship from the state's laws, the judgment of the circuit court should be affirmed.

Respectfully submitted,

LAURENCE H. TRIBE

Counsel of Record

KATHLEEN M. SULLIVAN

1525 Massachusetts Avenue

Cambridge, Massachusetts 02138

(617) 495-1767

*Counsel for Appellee**

WILLIAM B. ROGERS

American Civil Liberties Union of Oklahoma

Oklahoma City, Oklahoma

LEONARD GRAFF

Gay Rights Advocates, Inc.

San Francisco, California

* Counsel for Appellee gratefully acknowledge the assistance of Brian Koukoutchos, J.D. 1983.

(13)
No. 83-2030

Office - Supreme Court, U.S.

FILED

DEC 24 1984

ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

THE BOARD OF EDUCATION OF THE CITY
OF OKLAHOMA CITY,
STATE OF OKLAHOMA,
Appellant,
v.
THE NATIONAL GAY TASK FORCE,
Appellee,

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CENTER FOR
CONSTITUTIONAL RIGHTS, THE NATIONAL
LAWYERS GUILD, AND GAY FRIENDS &
NEIGHBORS, INC. IN SUPPORT OF APPELLEE
NATIONAL GAY TASK FORCE

RHONDA COPELON
Volunteer
Staff Attorney
for The Center for
Constitutional
Rights
CUNY LAW SCHOOL
AT QUEENS COLLEGE
200-01 42nd Avenue
Bayside, N.Y. 11361
(718) 357-7584

ANNE E. SIMON
(Counsel of Record)
SARAH WUNSCH
CENTER FOR
CONSTITUTIONAL
RIGHTS
853 Broadway
14th Floor
New York, N.Y. 10003
(212) 674-3303

Attorneys for Amici Curiae

December 24, 1984

74 ps

<u>TABLE OF CONTENTS</u>	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICI CURIAE.....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	8
I. EFFORTS TO SUPPRESS TEACHERS' RIGHTS OF EXPRESSION HAVE A LONG AND DISCREDITED HISTORY...	8
A. Anti-Slavery.....	9
B. McCarthyism.....	16
II. OKLA. STAT. TIT.70,§6-103.15 IS A CONTENT-BASED RESTRICTION ON SPEECH IN VIOLATION OF THE FIRST AMENDMENT AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.....	24
III. OKLA. STAT. TIT.70,§6-103.15 IS IMPERMISSIBLY VAGUE AND OVERBROAD.....	35
A. The Statute Permits the Presumption that Mere Know- ledge of a Teacher's Advocacy of Gay Rights Is Equivalent to Harm to the Operation of the School System.....	35
B. The Statute Operates Impermissibly to Chill Engage- ment by Teachers as Citizens in a Variety of Public Advocacy Contexts.....	42

C. The Statute Impermissibly Chills Teachers' Engagement in Scholarly Pursuits Essential to Their Educational Mission.....	47
IV. THE STATUTE'S OFFICIAL CONDEM- NATION OF PARTICULAR BELIEFS, FAR FROM FURTHERING LEGITIMATE GOALS, UNDERMINES IMPORTANT CONSTITUTIONAL AND EDUCATIONAL VALUES.....	57
CONCLUSION.....	63

TABLE OF CASES AND AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Adler v. Bd. of Educ. of City of New York</u> 342 U.S. 485 (1952).....	53
<u>Baggett v. Bullitt</u> 377 U.S. 360 (1964).....	<u>passim</u>
<u>Board of Educ., Island Trees, v. Pico</u> 458 U.S. 1 (1982).....	32, 47
<u>Brandenburg v. Ohio</u> 395 U.S. 444 (1969).....	25
<u>Communist Party of U.S. v. Subversive Activities Control Bd.</u> 367 U.S. 1 (1961).....	26
<u>Connick v. Myers</u> ___ U.S. ___, 103 S. Ct. 1684 (1983)...	30, 34
<u>Cramp v. Bd. of Public Instruction</u> 368 U.S. 278 (1961).....	43
<u>Crandall v. State of Connecticut</u> 10 Conn. 339 (1834).....	14
<u>Epperson v. Arkansas</u> 393 U.S. 97 (1968).....	33, 53
<u>Fricke v. Lynch</u> 491 F.Supp. 381 (D.R.I. 1980).....	56
<u>G.A.A. v. Bd. of Regents</u> 638 P.2d 1116 (Okla. 1981).....	56
<u>Gay Alliance of Students v. Matthews</u> 544 F.2d 162 (4th Cir. 1976).....	56

<u>Gay Lib v. Univ. of Missouri</u> 558 F.2d 848 (8th Cir. 1977), cert. denied sub nom. <u>Ratchford v. Gay Lib,</u> 434 U.S. 1080 (1978).....	56
<u>Gay Student Services v. Texas A.&M.</u> <u>Univ.</u> 737 F.2d 1317 (5th Cir. 1984)....	56
<u>Grayned v. Rockford</u> 408 U.S. 104 (1972).....	28
<u>Griswold v. Connecticut</u> 381 U.S. 479 (1965).....	47
<u>Healy v. James</u> 408 U.S. 169 (1972).....	26, 56
<u>James v. Board of Education</u> 461 F.2d 566 (2d Cir. 1972).....	31
<u>Keyishian v. Board of Regents</u> 385 U.S. 589 (1967).....	<u>passim</u>
<u>M.P. v. S.P.,</u> 169 N.J. Super 425, 404 A.2d 1256 (1979).....	60
<u>NAACP v. Alabama</u> 357 U.S. 449 (1958).....	44
<u>Nat. Gay Task Force v. Bd. of Educ.</u> <u>of the City of Oklahoma City</u> 729 F.2d 1270 (10th Cir. 1984)...	<u>passim</u>
<u>New York Times v. Sullivan</u> 376 U.S. 254 (1964).....	26
<u>Palmore v. Sidoti</u> ___U.S.___, 104 S.Ct. 1879 (1984)..	60
<u>Pickering v. Bd. of Ed. of</u> <u>Tp. H.S. Dist.</u> 391 U.S. 563 (1968).....	34, 43, 47

<u>Police Dept. of the City of Chicago</u> <u>v. Mosley</u> 408 U.S. 92 (1972).....	26, 27
<u>Schneider v. State</u> 308 U.S. 147 (1939).....	29
<u>Shelton v. Tucker</u> 364 U.S. 479 (1960).....	<u>passim</u>
<u>Slochower v. Bd. of Ed. of City of</u> <u>N.Y.</u> 350 U.S. 551 (1956).....	17
<u>Speiser v. Randall</u> 357 U.S. 513 (1958).....	16, 53
<u>Terminiello v. Chicago</u> 337 U.S. 1 (1949).....	60
<u>Tinker v. Des Moines Independent</u> <u>Com. Sch. Dist.</u> 393 U.S. 503 (1969).....	29, 30, 31, 41
<u>West Virginia State Bd. of Ed. v.</u> <u>Barnette</u> 319 U.S. 624 (1943).....	61, 62
<u>Wieman v. Updegraff</u> 344 U.S. 183 (1952).....	5, 42, 47, 52
<u>Constitution and Statutes</u>	
U.S. Const. amend. I.....	<u>passim</u>
U.S. Const. amend. XIV.....	28
1836-37 N. Carolina Rev. Statutes 580 §34.....	10
Okla. Stat. tit. 70 §1-116 (1982).	54

Okla. Stat. tit. 70 §6-103.15.....	<u>passim</u>
Okla. Stat. tit. 70 §6-103.3 et seq.....	40
1820 S.C. Statutes at Large VII, 460 (Law of 1820, §VI).....	10
1832 Va. Acts, §7, 21.....	10
1835-36 Va. Acts §44.....	11
<u>Other Authorities</u>	
Q. Bell, <u>Virginia Woolf</u> (1972)....	50
Carlsen, <u>American Literature</u> (McGraw-Hill Literature Series) (1984).....	50
Carlsen, <u>British and Western Liter- ature</u> (McGraw-Hill Literature Series) (1984).....	50
H. Carpenter, <u>W. H. Auden</u> (1981)..	50
D. Cate, <u>The Great Fear</u> (1978)...	<u>passim</u>
Countryman, <u>Washington in The States and Subversion</u> 282 (W. Gellhorn ed. 1952).....	18
C. Craig & F. Rice, <u>English Liter- ature</u> (Ginn Literature Series) (1984).....	50
L. DeSalvo, <u>Lighting the Cave: The Relationship Between Vita Sackville-West and Virginia Woolf,</u> 8 Signs 195 (1982).....	50, 51
2 <u>Dictionary of American Biography</u> (A. Johnson & D. Malone 2d ed. 1958).....	14

K. Dover, <u>Greek Homosexuality</u> (1978).....	49
J. Early, <u>Adventures in American Literature, Classic Edition</u> (Adventures in Literature Series) (1968).....	50
L. Edel, <u>Bloomsbury: A House of Lions</u> (1979).....	54
D. Faber, <u>The Life of Lorena Hickock, E. R.'s Friend</u> (1980)....	49
D. Farnan, <u>Auden in Love</u> (1984)...	50
Gellhorn, <u>A General View in The States and Subversion</u> 375 (W. Gellhorn ed. 1952).....	16
Harsha, <u>Illinois in The States and Subversion</u> 54 (W. Gellhorn ed. 1952).....	18
C. Hession, <u>John Maynard Keynes</u> (1984).....	54
A. Hodges, <u>Alan Turing: The Enigma</u> (1983).....	54
R. Hofstadter & W. Metzger, <u>The Development of Academic Freedom in the U.S.</u> (1955).....	9, 12, 13, 15
P. Lazarsfeld & W. Thielens, Jr., <u>The Academic Mind</u> (1958).....	21, 24, 53

- R. Martin, The Homosexual Tradition in American Poetry (1979).....49, 51
- H. McFarland, Psychological Theory and Educational Practice (1971)...52
- V. Navasky, Naming Names (1981)...17
- R. Nye, Fettered Freedom: Civil Liberties and the Slavery Controversy 1830-1860 (1963).....passim
- O'Brien, "The Thing Not Named": Willa Cather as a Lesbian Writer, 9 Signs 576 (1984).....49
- Okla. City Times, Jan.26, 1978....58
- T. Pettigrew, Racially Separate or Together? (1971).....59
- Plato, The Symposium (W. Hamilton trans. 1951).....49
- Prendergast, Maryland in The States and Subversion 140 (W. Gellhorn ed. 1952).....18
- Richmond Enquirer, Aug. 29, 1856..10
- P. Robinson, Willa: The Life of Willa Cather (1983).....50
- W. S. Savage, The Controversy Over The Distribution of Abolition Literature 1830-1860 (1938).....9, 10, 12
- Schmidt, Visions of Violence: Rimbaud and Verlaine in Homosexualities and French Literature 228 (G. Stambolian & E. Marks eds. 1979).....49

- C. Summers, E. M. Forster (1983)..50
- C. Willie & S. Greenblatt, Community Politics and Educational Change (1981).....59, 60
- P. Zweig, Walt Whitman: The Making of the Poet (1984).....49

INTEREST OF AMICI^{*}

THE CENTER FOR CONSTITUTIONAL RIGHTS (CCR) is a non-profit legal and educational corporation founded in 1966, dedicated to advancing and protecting the rights and liberties guaranteed by the Bill of Rights. CCR has been involved in numerous cases challenging interference with first amendment rights, particularly where the government has sought to restrict the expression of unpopular opinions and ideas. See, e.g., United States v. United States District Court, 407 U.S. 297 (1972) (internal security wiretaps subject to warrant procedures); People v. Uplinger, 460 N.Y.S.2d 514 (N.Y. 1983), cert. dismissed as improvidently granted, __U.S.__, 104 S.Ct. 2332

^{*}The parties have given written consent to the filing of this brief amicus curiae; letters of consent have been filed with the Clerk of this Court.

(1984) (invalidating state law punishing
✓ public speech by gay people),

THE NATIONAL LAWYERS GUILD (NLG) is an organization of nearly 8,000 lawyers, law teachers, law students and legal workers. Since its inception in 1937, the NLG has worked consistently on behalf of groups seeking equality and social justice. Some NLG members are teachers who take part in public discussion and efforts to end discrimination against gay men and lesbians. They are harmed by statutes such as Okla. Stat. tit 70 § 6-103.15 which threaten them with job loss for exercising their first amendment rights of speech and association.

GAY FRIENDS AND NEIGHBORS, INC. (GFN) is an organization of approximately 400 gay men and lesbians in the New York area, including teachers in both public and private schools. GFN is representative of many grassroots organizations

throughout the country that provide the local lesbian and gay community with a place to discuss topics of common interest. Through outreach programs to the larger community it has established lesbians and gay men as a part of the diverse neighborhood in which its members live. These activities are impermissibly threatened by government restrictions which cut off communication about the rights of gay people and the realities of being gay.

SUMMARY OF ARGUMENT

The test of freedom of expression is the ability of this nation to tolerate startling ideas and stand up against campaigns of intolerance. Our history is a checkered one: early critics of government were punished under the Alien

and Sedition Laws, later ones, by the anti-Communist or anti-"subversive" laws and purges of the McCarthy period. Expression of heretical ideas was banned during the abolitionist period and again during the fundamentalist upsurge of the late nineteenth century. On the other hand, largely due to the timely intervention of the federal judiciary and this Court, some efforts to quash dissenters, such as opponents of the Vietnam War, have been cut short by vigorous enforcement of the first amendment.

School teachers have often been prime targets in campaigns against heterodoxy. But efforts--most particularly content-based ones--to deny teachers their rights as citizens and scholars to participate in advocacy and inquiry outside the school, as well as to engage in responsive discussion within, are

deadly to the central goals of education at every level.

It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them.

Wieman v. Updegraff, 344 U.S. 183, 196-97 (1952) (Frankfurter, J. concurring).

The Oklahoma statute which punishes and stigmatizes teachers for speaking on issues of homosexuality and gay rights is an old problem in new guise. It singles out non-condemnatory speech about homosexuality for proscription, although the issues such speech addresses are of great public importance. This prohibition does not implement any proper neutral rule of discipline in public or school

employment; rather, it acts only as a means to suppress a particular point of view.

The statute's negative impact on first amendment rights is effected both through singling out a special disfavored content and by relying on an impermissibly vague, as well as overbroad, statutory structure. The teacher is put at risk of losing her/his job simply because someone else has reported to the authorities that she/he said certain things. This triggering mechanism, in combination with the vague and open-ended nature of the disfavored speech, encourages reporting to school authorities of what teachers say off the job, in their capacity as citizens. The sweep of the statute's substantive prohibition is so broad as to encompass peaceful advocacy of civil rights and changes in the law, at the core of first

amendment protections. Because of its encouragement of informing, the statute even reaches to private discussions of public issues.

The statute clearly puts teachers at risk in a variety of settings. Seeking to avoid trouble resulting from the expression of their views, teachers will choose not to express them. The chill thus imposed by the statute also extends to the scholarly and professional activities of teachers, since it penalizes utterances in any context that might reflect the forbidden views on homosexuality.

None of the adverse consequences of the statute has any legitimate justification. On the contrary, the statute impoverishes the educational experience of children by silencing and intimidating their teachers. Instead of transmitting the importance of our constitutional

heritage, it denies and contradicts the fundamental constitutional and social values of open discussion, tolerance, and advocacy of change.

ARGUMENT

I. EFFORTS TO SUPPRESS TEACHERS' RIGHTS OF EXPRESSION HAVE A LONG AND DISCREDITED HISTORY

The various campaigns to stifle thought and protect orthodoxy in the U.S. shared certain characteristics. They have involved ideas which question the status quo and were experienced as deeply threatening to personal or political security or the hegemony of a particular moral code. They have sometimes emerged when the hated ideas had achieved the status of an issue of public importance. Sometimes they have served as a device to delegitimize advocacy on a broad range of social issues. Each campaign that has

not been quickly undercut by the courts silenced educators, distorted education and touched off ideological witch-hunts and vilifications. Each, in turn, has been repudiated when the dangers to freedom were finally recognized.

A. Anti-Slavery

The South responded to a series of slave insurrections in the 1830s by broad and sweeping attempts to control anything which might foster insurrections.¹ A prime candidate for such control was education, both of Blacks and whites. At root, however, this campaign was not directed simply at preventing uprisings,

¹For treatments of this period, see Nye, Fettered Freedom: Civil Liberties and the Slavery Controversy 1830-1860 (1963); W. Savage, The Controversy Over the Distribution of Abolition Literature 1830-1860 (1938); R. Hofstadter and W. Metzger, The Development of Academic Freedom in the U.S., 253-61 (1955).

but at teaching in "[e]very school and college in the South . . . that Slave Society is the common, natural, rightful, and normal state of society. . . ." ² To this end, it was deemed necessary to forestall any mention or discussion of even the mildest criticism of slavery by teachers, in schools, or in textbooks.

Statutes were passed forbidding slaves or free Blacks to teach, ³ the distribution of anti-slavery literature, ⁴ or the questioning of a slave owner's

²Richmond Enquirer, Aug. 29, 1856; cited in Nye, supra n. 1, at 90.

³E.g., 1832 Va. Acts § 1,20; Revised Statutes of North Carolina, 1836-37, p. 580, § 34 (cited in Savage, supra n. 1, at 5 n. 25).

⁴E.g., 1832 Va. Acts, § 7, 21; Statutes at Large of South Carolina, VII, 460 (Law of 1820, Section VI) (cited in Savage, supra n. 2 at 6 n. 28); on the statutory attempts to circumvent the intent of the federal Mails Law of 1836, see Nye, supra n. 1, at 80-81.

property right in his slaves.⁵ Enforcement of these controls on the content and manner of expression was relatively simple in the lower schools "since these schools were closely controlled by the community they served." Nye, supra, n. 1, at 90. Control in colleges required greater vigilance, but "by 1840 . . . a rigorous regimentation of opinion [existed] concerning slavery and topics related to it." Id. at 91.⁶ A University of Virginia professor noted in 1857 that "a funeral pall" had been drawn over rational discussion; critical views that had previously been openly expressed

⁵E.g., 1835-36 Va. Acts § 44.

⁶E.g., Judge Nathan Green of Cumberland University (Tennessee), a slave owner, expressed antislavery views in his law class and was attacked as "a dangerous man to the South, not fit to instruct Southern youth." Nye, supra n. 1, at 96.

were now withheld or whispered in confidence. Hofstadter and Metzger, supra n. 1, at 256.⁷

Savage observes that the pall extended to written expressions as well.

The South attempted to close every avenue through which objectionable literature might reach it. There was little fear of these books reaching slaves. . . . [T]he real fear was that [anti-slavery] doctrines would circulate among the whites in the South.

Savage, supra n. 1, at 101.

In the North, the effort to forbid antislavery speech lost ground after

⁷It is interesting to note, however, that even given the intensity of the campaign to silence anti-slavery speech, high state courts were sometimes reluctant to prohibit mere speech without direct incitement. Savage, supra n. 1, at 101-02, 113-17.

⁸Literature committees condemned leading texts in history and philosophy and The Southern Educational Journal announced a series of "revised" textbooks. Savage, supra n. 1, at 118-19; Nye, supra n. 1, at 96-97.

1840. Nonetheless, a distinction was usually made between those who "condemned slavery abstractly on moral grounds or proposed gradual or ultimate emancipation, and the 'immediate' abolitionists" Hofstadter and Metzger, supra n.1, at 259. A number of student abolitionist societies were suppressed and some anti-slavery faculty were pressed to resign, Nye, supra n.1, at 107-13, in order "to keep order, to avoid the agitation of an unpopular question." Id. at 113.⁹

Special hostility was shown to those who sought to educate Blacks. In 1833,

⁹Thus, when a faculty and student abolitionist discussion group at Lane Seminary (Cincinnati, Ohio) began working with local Blacks to organize clubs and schools, the Board outlawed discussions which might "excite party animosities," forbade meetings, and outlawed public addresses. Forty students and two professors withdrew in protest. Nye, supra n.1, at 110-12.

Prudence Crandall admitted a Black girl to her girls' school, and announced her intention of opening a school exclusively for Black girls. Her home was attacked and she narrowly escaped physical violence. The legislature passed a law designed to prevent the opening of the school, by requiring that non-inhabitant Blacks could be admitted to Connecticut schools only by permission of the local selectmen. Crandall was arrested and imprisoned. 2 Dictionary of American Biography 503-04 (A. Johnson & D. Malone, 2d ed. 1958) She was convicted, but the conviction was reversed on appeal for insufficiency of the indictment. Crandall v. State of Connecticut, 10 Conn. 339 (1834).

This brief sketch indicates how fear of the effects of anti-slavery ideas led to attempts to control the range of their impact in Northern schools and to a broad

and sweeping attempt to control any contact with them in Southern schools.

It led ultimately to a complete misunderstanding of the plantation system, and fostered intolerance of frank discussion of other problems connected with slavery.... By 1855 the South had lost all sense of proportion in regard to slavery, making claims for the system that few intelligent slaveholders thirty years earlier would have accepted as reasonable. Because Southern teachers and scholars had been denied their function for thirty years, the South could neither understand nor tolerate self criticism.

Nye, supra n. 1, at 100-01.

Not only the South suffered the loss. "The suppression of academic discussion was a token of a more general and more important suppression of thought and criticism that in the end took the entire subject [of abolition] out of the sphere of discussion and into the realm of force." Hofstadter and Metzger, supra n. 1, at 261.

B. McCarthyism

In the 1940s and 1950s, the intense scrutiny of beliefs produced by "anti-subversive" campaigns affected people in all walks of life,¹⁰ but "nowhere [was] concern about subversive activities . . . more steadily manifest than in the educational process." Gellhorn, A General View, in The States and Subversion 375 (W. Gellhorn, ed. 1952) (hereinafter, "States and Subversion"). It was expressed in legislation in over 30 states requiring some form of "loyalty" oath by teachers;¹¹ state legislative

¹⁰A partial listing of occupations affected was given by Justice Black in his concurrence in Speiser v. Randall, 357 U.S. 513, 531 (1958).

¹¹D. Cate, The Great Fear 404 (1978). The unconstitutionality of these oaths was established in Baggett v. Bullitt, 377 U.S. 360 (1964), more than a decade after they had been instituted.

committees¹², and in actions by local school authorities.¹³

Official condemnation and suspicion of "subversion" called forth a vast array of informants, both amateur and professional, and engendered efforts to encourage or coerce reporting on other people in a wide variety of circumstances.¹⁴

¹²Detailed histories of several such investigations are set forth in States and Subversion, supra p. 16.

¹³The New York City device of dismissing teachers who had invoked the fifth amendment in response to questions about their political views and associations was held unconstitutional in Slochower v. Bd. of Ed. of City of N.Y., 350 U.S. 551 (1956), six years after New York began firing teachers on that basis. Cate, supra n. 11, at 434. Slochower did not, however, result in the reinstatement of teachers fired for invoking the privilege. Id. at 439. Not until 1973 were pension rights restored to some of the teachers who had been fired. Id. at 442.

¹⁴V. Navasky, Naming Names, (1981), provides an in-depth study of the destructive effects of the system of

(Footnote Continued)

Professional informants were crucial to a number of investigations; many of them were later discredited. See Cate, supra n. 11, at 111-38; Harsha, Illinois in States and Subversion, supra p. 16, at 90-91 (role of professionals in investigation of University of Chicago and Roosevelt College); Countryman, Washington, in id. at 299-301 (role of professionals in investigation of University of Washington). No less important, and even more unpredictable, were private individuals who made occasional complaints about alleged subversive activities. Many of them were "likely to be trivial and irrelevant." Prendergast, Maryland, in id. at 168.¹⁵

(Footnote Continued)
reporting about the alleged ideas and associations of others.

¹⁵The particular prosecutor mentioned in this article carefully
(Footnote Continued)

The open-endedness of the official inquiries and their legitimation of any and all suspicions sanctioned extensive reporting efforts.

These concerted efforts had devastating effects on many individuals. Hundreds of teachers lost their jobs outright. Cate, supra n. 11 at 406. Many of them never returned to teaching and were barely able to survive financially. Id. at 551-56.

Several large public educational systems, notably New York, Philadelphia, and Los Angeles, as well as the University of California, were in turmoil for years as wave after wave of

(Footnote Continued)
screened and dismissed such allegations. But reliance on the good will and good sense of prosecutors or legislative investigators was often insufficient protection. Cf. Baggett v. Bullitt, 377 U.S. at 373. See Sec. III. A., infra.

investigations and restrictions was imposed.¹⁶ In New York City, the years from 1949 to 1956 saw numerous investigations, interrogations, firings, and resignations. There was even a period during which the Board of Education adopted a policy requiring teachers to "inform on their colleagues when commanded to do so by the Superintendent." Cate, supra n. 11, at 439-40. By the end of the decade, over 400 teachers had been fired, had resigned, or had been declared to be

¹⁶During a year of constant crisis in 1950-51 over the attempted imposition of a loyalty oath by the Regents of the University of California, 26 teachers were fired, 37 resigned in protest, and 47 refused appointments they were offered; 55 courses had to be cancelled. Cate, supra n. 11, at 422-24.

rehabilitated after intensive interrogation. Id. at 441.¹⁷

The investigations, interrogations, and sanctions had severe and lasting effects on many teachers who were not directly attacked, and on the profession as a whole. In 1955--as the worst was ending--the Columbia University Bureau of Applied Social Research conducted a national survey of college teachers of social science.¹⁸ P. Lazarsfeld and W.

¹⁷The underlying statute, the "Feinberg Law," was declared unconstitutional in Keyishian v. Board of Regents, 385 U.S. 589 (1967).

¹⁸The sample included both tenured and untenured teachers at public and private institutions. This does not, however, vitiate its application to the situation of public elementary and secondary schools. If anything, the respondents to the survey were in more secure positions, since many of them were not subject to local school authorities, and many of them were tenured. Cf. Shelton v. Tucker, 364 U.S. 479, 482 (1960) (absence of tenure system for teachers).

Thielens, Jr., The Academic Mind (1958). The survey showed that over one-third of the 2,451 respondents had noticed an increase in their colleagues' unwillingness, compared to six or seven years earlier, to express unpopular views in the community. Teachers were clearly concerned about the negative effects of exercising their rights as citizens. Id. at 195. Twenty percent of the respondents also reported that they noticed that their colleagues had become less willing to express unpopular political views in the classroom. Id.¹⁹

Not surprisingly, attacks on a few teachers had an in terrorem effect on

¹⁹Since faculty members rarely sit in on each other's classes, this figure probably represents extremely obvious retrenchments, noticeable to someone not in close contact with the behavior. More subtle changes defy recording in this way.

many teachers. It is precisely this aspect of suppression of expression that undergirds the legal recognition of the chilling effects of such attacks, which lead people to "avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe." Baggett v. Bullitt, 377 U.S. at 372.²⁰ One aspect of this phenomenon is of particular interest here. The reported apprehension experienced by respondents in the Academic Mind study increased as they learned of more attacks on teachers in their area. Their apprehensive response

²⁰"Chill" is sometimes too mild a description. One New York teacher was threatened with discharge in 1949 because she asked for time to consult a lawyer before answering questions about her political associations in 1940 and 1941. The night after she was questioned, she committed suicide. Caute, supra n.11, at 433.

increased, however, independent of their own political views. Even teachers who had no reason to think that the content of their views would meet with disapproval nevertheless were made appreciably more nervous by content-based attacks on their colleagues. Id. at 257-60. In short, a concerted effort to silence teachers about major public issues affected virtually the entire political spectrum within the profession.

II. OKLA STAT. TIT. 70 §6-103.15 IS A CONTENT-BASED RESTRICTION ON SPEECH IN VIOLATION OF THE FIRST AMENDMENT AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Oklahoma statute penalizes speech affirming or even examining the permissibility of homosexuality, if it is likely to come to the attention of a

school employee or student.²¹ As a classic content-based regulation of speech, it reflects one of the most dangerous and destructive forms of

²¹As the Tenth Circuit makes clear, the terms "advocating,... encouraging or promoting public or private homosexual activity" cannot be confined, as Appellants argue, to speech which urges the performance of homosexual sodomy still criminal in Oklahoma. See, NGTF v. Board of Education of the City of Oklahoma City, 729 F.2d 1270, 1273-74 (10th Cir. 1984). Compare Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). To advocate that homosexual sodomy be decriminalized "promotes," by undercutting the condemnation of homosexuality.

On the other hand the Brandenburg issues raised by the "soliciting" and "imposing" terms of the statute are not before the Court on this appeal. Under Brandenburg, 395 U.S. 444 (1969), adjudication of the constitutionality of these sections requires that the distinct questions of the constitutionality of Oklahoma's criminal homosexual sodomy law be considered. Though the Circuit left these provisions standing, it did not decide their validity. Since appellees did not cross-appeal the Circuit's failure to decide, the issue must await consideration in a separate case where the privacy issues are fully and squarely before the Court.

censorship which the first amendment was designed to prohibit:

To permit the continued building of our politics and culture and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.'

Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972), quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964). Justice Powell struck the same chord in Healy v. James:

The Court has previously determined that the State may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent... 'the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.'

408 U.S. 169, 188 (1972) quoting

Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 137 (dissent).

The justification given for the content-based regulation of § 6-103.15 is that the forbidden non-hostile views of homosexuality may disrupt the school's functioning when co-employees or students learn that a teacher made these comments. A similar justification was rejected in Police Dept. v. Mosley, where the ordinance, allegedly aimed at preventing disruption in the schools, prohibited all picketing near schools during school hours, with the exception of labor picketing.²² The goal of preventing

²² The view that Mosley is inapposite on the ground that it contains an absolute prohibition on other than labor picketing, whereas the Oklahoma statute purports to establish more particularized criteria for disruption, (Footnote Continued)

disruption in the schools was obviously deemed valid but the content-based manner in which the state pursued that goal violated the first amendment and the equal protection clause of the fourteenth amendment.

By contrast, the general antinoise regulation in Grayned v. City of Rockford, 408 U.S. 104 (1972), was upheld because it was directed at the actual disruptive evil, noise, and no presumptions were made that particular thoughts were noisier than others. The statute here, however, is aimed at content, rather than at general, content-neutral evil, and is therefore impermissible. The very existence of

(Footnote Continued)
is fallacious. The structure and presumptions of the statute operate just as effectively to eliminate an entire area of communications. See Sec. III, infra.

this special law directed at gay rights advocates denies them equal protection of the laws in relation to the exercise of their first amendment rights.

The state's disapproval or "undifferentiated fear or apprehension," Tinker v. Des Moines Indep. Com. Sch. Dist., 393 U.S. 503, 508 (1969), of non-condemnatory speech about homosexuality which may come to the attention of other school employees or students cannot be equated, as the statute does, with interference with legitimate school functions. "'Mere legislative preferences or beliefs...[are] insufficient to justify such [regulation] as diminishes the exercise of rights so vital to the maintenance of democratic institutions.'" Shelton v. Tucker, 364 U.S. at 489, quoting Schneider v. State, 308 U.S. 147, 161 (1939).

In Tinker, school officials could not prohibit "a particular expression of opinion" without demonstrating that it would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." 393 U.S. at 509.

Certainly broad restrictions on teacher expression outside the school must be justified by substantial disruption of school requirements as well. The Oklahoma statute requires none.

Instead the statute makes the presumptive equation of dislike of an idea with harm. The dissenting judge below expressed that view in his statement that a teacher who "advocates" or "encourages" homosexual behavior

...is in fact and in truth inciting school children to participate in the abominable and detestable crime against nature....There is no need to demonstrate that such conduct would bring about a material or substantial

interference or disruption in the normal activities of the school.

(emphasis in original). NGTF v. Board of Education, 729 F.2d at 1276 (Barrett, J. dissenting.)

The disagreement that speech may likewise engender cannot suffice to establish the kind of disruption ²³or even prediction of disruption required to restrict the teacher from offering comments considered sympathetic to gay people in public discussions and debates. See Connick v. Meyers, ____ U.S. ____, 103 S.Ct. 1684, 1693 (1983); James v. Board of Education, 461 F.2d 566, 572 (2d Cir. 1972) (prediction of disruption from teacher expression within school cannot be based on disagreement about ideas expressed).

²³Justice Black's catalogue of such "disruptions", 393 U.S. at 517-18, was rejected by the Tinker Court.

To insist that the first and fourteenth amendments protect the right of teachers to speak on this subject in numerous contexts outside the schools as well as informally within does not threaten, even on the broadest view, the legitimate power of school authorities to select on the basis of content among subjects and books. This statute--by operating against teachers in all contexts on the basis of explicit hostility toward or fear of the content of their speech--qualifies under the narrowest definition of "suppression of ideas," Board of Educ. of Island Trees v. Pico, 102 S.Ct. at 2835 (Rehnquist, J. dissenting). The policy of the Oklahoma statute is not only akin to "forbidding the criticism of United States policy...."

Id. at 2834.²⁴ It also exerts external control--beyond the confines of the school--to stifle participation in community activities and public debate on this single issue.

The cases involving public employees who speak out about their employer's policies or supervisors, either within the workplace or outside do not apply here. They do not involve content-based restrictions. Nor are they relevant to a statute restricting teacher speech outside the workplace on issues of public concern. However, even those cases make clear that public employers may not interfere with employee speech on matters of substantial public concern absent some demonstration that serious disruption of

²⁴ See also Epperson v. Arkansas, 393 U.S. 97, 116 (1968) (Stewart, J. concurring).

legitimate workplace concerns is likely to occur. Pickering v. Board of Ed. of Tp. H.S. Dist., 391 U.S. 563 (1968).

In Connick v. Myers, 103 S.Ct. at 1692-93 (1983), substantial disruption was not required to uphold the firing of an assistant district attorney because the employee's speech "touch[ed] upon matters of public concern in only a most limited sense." Connick at 1693. Rather, the employee's speech, was viewed at heart as an employee complaint about internal office policies.

In sum, while the state has a right to determine the fitness of its teachers, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488.

III. OKLA. STAT. TIT. 70, §6-103.15 IS IMPERMISSIBLY VAGUE AND OVERBROAD.

- A. The Statute Permits the Presumption that Mere Knowledge of a Teacher's Advocacy of Gay Rights Is Equivalent to Harm to the Operation of the School System.

The Tenth Circuit properly held that the factors to be considered under § 6-103.15(c) in determining unfitness do not save the statute from unconstitutionality. 729 F.2d at 1275. In addition to the reasons set forth by the Circuit, amici wish to emphasize that, in practice, the statute permits mere knowledge of teacher advocacy on the part of an employee or student to trigger the dismissal process. Accordingly, a teacher will easily fear that almost any mention of homosexuality or gay issues could come to the attention of the school authorities.

The vice of this statute thus is not only the fact that a teacher can be fired for unfitness because some expressional

activity relating to gay rights came to the attention of school children or personnel, but also that merely for making a non-condemnatory statement about homosexuality, a teacher's fitness can be called into question. The law thus encourages the reporting of expressional activity that might otherwise remain unnoticed or insignificant, and, thereafter, sets into motion a process in which a teacher's integrity, morality, and beliefs are stigmatized and subject to inquisition.

The statute--in its procedural operation as well as its blanket censorial admonition--is reminiscent of the schemes devised during the McCarthy period to stifle protected expression of beliefs relating to social conditions and

social change.²⁵ This statute does not create a state apparatus for discovery and reporting of offending comments (compare Shelton v. Tucker, 364 U.S. 479, 480-81 (1960); Keyishian v. Board of Regents, 385 U.S. 589, 594 (1967)), but it encourages both crusading officials and private groups and individuals to broadly invade realms of protected association and expression. See Sec. I.B., supra.

Despite Appellant's attempt to make it appear so (Br. at 31), the so-called

²⁵One aspect of that process was stigmatizing people who expressed particular ideas or had particular associations by inferring, from the ideas and associations, membership in a disfavored group, e.g., the Communist Party. In this case, there is a similar attempt to equate protected advocacy of gay rights with the (presumed to be) disfavored status of being homosexual. See, e.g., Brief Amicus Curiae of Concerned Women for America Education and Legal Defense Foundation at 16-20.

"unfitness" or "nexus" factors in the statute do not in fact require any showing beyond the receipt of knowledge of the speech at issue. Not only is it not mandatory that an additional adverse effect be shown, but a school board convinced that homosexuality is malum in se is not foreclosed from treating knowledge alone as satisfying the adverse impact test, much as Judge Barrett's dissent suggests. 729 F.2d at 1276. Moreover, the proximity criteria (§ 6-103.15(c)(2)) could, as the amicus, Concerned Women for America Education and Legal Defense Foundation, implicitly concedes, make actionable any statement made within the community in the last ten years. Brief at 14. The criteria of extenuating or aggravating circumstances detract nothing from the chilling effect. They would not exculpate the teacher who spoke out publicly. §6-103.15(c)(3).

Finally, § 6-103.15(c)(4) does not establish a test for permissible, albeit continuing statements; rather it creates a presumption that continuing statements are harmful per se.

The breadth of the statute is further expanded by allowing mere knowledge of a statement and impact on an adult school employee to trigger dismissal. Thus, if a school employee--deliberately or inadvertently--hears, witnesses, overhears, or receives a report about a co-worker's protected expression, and reports it to the superintendent, the teacher can be suspended or dismissed. Few teachers will be willing to take the risk of such inquiry and stigmatization.

Nor can it be assumed that either the school superintendant, who recommends dismissal in the first instance, or the local Board of Education, which approves

the action,²⁶ will exercise discretion under the statute to confine its application to circumstances that warrant it. Both the superintendant and the elected board are subject to local pressures to mount an anti-homosexual campaign where that seems desirable. As Justice White said in Baggett v. Bullitt, "well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." 377 U.S. at 373.

Thus the statute does not even require a minimal showing of harm. The potential for inhibition of protected conduct is thus sweeping; the potential for persecution--for reviving in a new guise the various "witch" trials that have marred our history--is enormous.

²⁶Okla. Stat. tit. 70, §§6-103.3 et seq.

But "first amendment freedoms need breathing space to survive..." Keyishian, 385 U.S. at 604. That breathing space is choked off under the Oklahoma statute.

But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, Terminiello v. Chicago, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom--this kind of openness--that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Tinker v. Des Moines Independent

Com.Sch.Dist., 393 U.S. at 508-09.

B. The Statute Operates Impermissibly To Chill Engagement By Teachers as Citizens in a Variety of Public Advocacy Contexts.

The Court has made clear that the teacher as citizen cannot be required by content-based regulation to forego the exercise of first amendment rights in the community outside the school as the price of keeping a job. See, e.g., Wieman v. Updegraff, 344 U.S. 183 (1952); Shelton v. Tucker, 364 U.S. 479 (1960); Keyishian v. Board of Regents, 385 U.S. 589 (1967). These cases establish the strong protection given to public school teachers when they exercise first amendment rights in the public sphere on matters of public concern.

The statute applies most obviously to advocacy in the public arena, including speaking, writing, testifying at legislative hearings, and attending meetings and demonstrations that support

the rights of lesbians and gay men.²⁷ This is precisely the kind of expression that is classically guaranteed to all citizens, including teachers, yet it is gravely endangered by the statute. See Keyishian v. Board of Regents, 385 U.S. 589 (1967); Pickering v. Bd. of Ed. of Tp. H.S. Dist., 391 U.S. 563 (1968).²⁸

Because the statute can be triggered simply by a report of having heard a

²⁷Such advocacy issues are on the public agenda throughout the country. Decriminalization of private, consensual, adult homosexual acts; civil rights protection for lesbians and gay men and non-discrimination in public employment have been undertaken at all levels of government and are under active discussion in many areas.

²⁸Far from being an example of disregard for law, as Appellant suggests (Br. at 34), the advocacy prohibited in this case is almost exclusively that which seeks change and acceptance of gay rights through constitutionally protected channels or petition for redress. See Baggett v. Bullitt, 377 U.S. at 368; Cramp v. Bd. of Public Instruction, 386 U.S., 278, 286 (1961).

teacher say certain things, it reaches discussions of homosexuality in a wide variety of semi-public yet protected associational contexts. Whether or not discrimination against lesbians and gay men should be prohibited is the topic of discussion in churches and church-related groups, in unions, in political parties, in medical, psychiatric, psychological and social work organizations. See generally, Amicus Curiae Brief on Behalf of the Appellee by Lambda Legal Defense and Education Fund. An advocate of gay rights might wish to join a gay rights organization or subscribe to journals which advocate or discuss gay rights. See, e.g., NAACP v. Alabama, 357 U.S. 449 (1958); Shelton v. Tucker, 364 U.S. 479 (1960). Any of these activities, if publicized or reported to school authorities, could enmesh a teacher in the statutory process.

The statute also presents a substantial risk of exposure even from more private informal gatherings and social occasions. A restaurant conversation erupts into a heated debate about gay rights; a serious discussion is overheard by the occupants of a neighboring booth. In the face of these risks, caution and silence may govern.

In Keyishian v. Board of Regents, 385 U.S. 589 (1967), state laws and regulations permitting the dismissal of public school teachers for pure speech were struck down. The vague and potentially overbroad scope of the banned speech and the investigatory machinery created to ferret it out for examination were deemed by the Court to constitute a method of terrorizing teachers so as to constrict their expression of political ideas.

It would be a bold teacher who would not stay as far as possible from

utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery. The uncertainty as to the utterances and acts proscribed increases that caution in 'those who believe the written law means what it says.'

Keyishian, 385 U.S. at 601, quoting
Baggett v. Bullitt, 377 U.S. at 374.

Indeed the Court has repeatedly stressed the importance of preserving such freedom in light of the particular and important role played by teachers in society:

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.... But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, in the case of teachers brings the safeguards of those amendments vividly into operation.

Wieman v. Updegraff, 344 U.S. 183, 195
(1958) (Frankfurter, J. concurring).

Faced with the "threat of dismissal from public employment" which is "a

potent means of inhibiting speech", Pickering, 391 U.S. at 574, a group of generally well educated adults with knowledge of children's development will not dare to share their ideas in the world at large.²⁹ The state of Oklahoma has set forth no substantiated justification for this sweeping result. Rather, the statute is a prime example of the "government as educator...seek[ing] to reach beyond the confines of the school."

Bd. of Ed., Island Trees v. Pico, 102
S.Ct. at 2833 (Powell, J., dissenting.)

C. The Statute Impermissibly Chills Teachers' Engagement In Scholarly Pursuits Essential To Their Educational Mission.

The statute's impact on teachers' ability to maintain or improve their

²⁹The harm to the world outside the school is great. For that world, "the spectrum of available knowledge" will be contracted. Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

competence through professional activities outside of the school building is sharp and deleterious. An understanding of homosexuality can be essential to understanding literature, interpreting and applying the social sciences, or illuminating history. Many teachers read current scholarship in their fields and discuss it with their colleagues. Many teachers take advanced courses, both to aid in their work and to prepare themselves for advancement in their jobs. Is a copy of an article or book on homosexuality impermissible "promotion"? Cf. Keyishian, 385 U.S. at 599 (carrying a copy of the Communist Manifesto on a public street). This statute truncates full participation in these activities, and in some situations makes any participation impossible.

A particularly clear example is the situation of high school teachers of

literature.³⁰ A teacher who wants to explore dispassionately the life and works of widely anthologized authors runs a serious risk of falling afoul of the statute. The works of Walt Whitman,³¹ Willa Cather,³² E. M. Forster,³³ W. H.

³⁰This is by no means the only example. Teachers of U.S. history may want to learn more about Eleanor Roosevelt. See D. Faber, The Life of Lorena Hickock, E.R.'s Friend (1980). Teachers of French language and literature may want to deepen their understanding of Verlaine, see Schmidt, Visions of Violence: Rimbaud and Verlaine, in Homosexualities and French Literature 228-42 (G. Stambolian and E. Marks, eds. 1979). Teachers of world history and philosophy may want to understand classical Greek culture and social relations. See Plato, The Symposium (W. Hamilton trans. 1951); K. Dover, Greek Homosexuality (1978). Any teacher may want to take courses in women's studies, psychology, sociology, or the history of sexuality.

³¹See R. Martin, The Homosexual Tradition in American Poetry 3-89 (1979); P. Zweig, Walt Whitman: The Making of the Poet (1984).

³²See O'Brien, "The Thing Not
(Footnote Continued)

Auden,³⁴ and Virginia Woolf³⁵ have been taught for years to students throughout the U.S.³⁶ Must a teacher fear that

(Footnote Continued)

Named": Willa Cather as a Lesbian Writer, 9 Signs 576 (1984); P. Robinson, Willa: The Life of Willa Cather (1983).

³³See C. Summers, E. M. Forster, (1983). Forster, whose novel A Passage to India is widely read, is also the author of Maurice (Macmillan edition 1971), a novel with an explicitly homosexual theme.

³⁴See H. Carpenter, W. H. Auden (1981); D. Farnan, Auden in Love (1984).

³⁵See Q. Bell, Virginia Woolf (1972); L. DeSalvo, Lighting the Cave: The Relationship between Vita Sackville-West and Virginia Woolf, 8 Signs 195 (1982).

³⁶For example, C. Craig and F. Rice, English Literature (Ginn Literature Series) (1964) contains works by Woolf, Forster, and Auden. J. Early, et al, Adventures in American Literature, Classic Edition (Adventures in Literature Series) (1968) includes Whitman, Cather, and Auden. Carlsen, et al, American Literature (McGraw-Hill Literature Series) (1984) contains Whitman and Cather. Carlsen, et al, British and Western Literature (McGraw-Hill Literature Series) (1984) collects

(Footnote Continued)

discussing homosexuality and great authors in the same breath would be construed to violate the statute? The statute clearly endangers a teacher's ability to discuss--in any context--any scholarly work that draws a positive connection between an author's work and her or his homosexuality. See, e.g., DeSalvo, supra n. 35, Martin, supra n. 31. It therefore makes it impossible for teachers to think openly and effectively. "It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and encourage." Wieman v.

(Footnote Continued)

Forster, Woolf, and Auden. Editions of Adventures in American Literature and both McGraw-Hill books are approved for use in Oklahoma schools.

Updegraff, 344 U.S. 183, 195 (1952)
(Frankfurter, J. concurring).³⁷

Finally, although the statute is aimed primarily at speech outside the school, it also muzzles the teacher's ability to discuss or respond to issues of homosexuality as they may be raised by the curriculum or by the students themselves. Just as this Court in Keyishian, 385 U.S. at 600, implicitly criticized the Feinberg Law for deterring a teacher from informing a class about the precepts of Marxism, here the statute chills a teacher from even mentioning the existence of homosexuality, its relevance to the subject under study, or particular views that it is an acceptable life style. See also Epperson v. Arkansas, 393

³⁷See also, H. McFarland, Psychological Theory and Educational Practice 201 (1971).

U.S. 97, 116 (1968) (Stewart, J. concurring in the result).

The Oklahoma statute constrains discussion by alerting colleagues and students to look for every allegedly homosexual nuance in presentation.³⁸ Thus, the statute encourages the hearer to participate in "a system which searches for hidden meanings in a teacher's utterances," Adler v. Board of Education of City of New York, 342 U.S. 485, 510 (1952) (Douglas, J. dissenting), and the speaker to "steer far wider of the unlawful zone," Speiser v. Randall,

³⁸The analogues to the McCarthy era are not far to seek. "One historian gave a reading assignment on the constitution of the Soviet Union, 'only to find that the mere fact that I said they had a constitution made the students think that I was a Commie.'" Lazarsfeld and Thielens, supra p. 16, at 197. Teachers in the survey reported a wide range of negative effects on their professional functioning, both in class and outside. Id. at 197-213.

357 U.S. 513, 526 (1958). For example: What was the significance of the history teacher's comments about the breadth of John Maynard Keynes's interests, as illustrated both by his marriage to a Russian ballerina, Lydia Lopokova, and his long relationship with an English painter, Duncan Grant?³⁹ Why did the mathematics teacher talk at length about Alan Turing, who developed the idea on which modern computers are based?⁴⁰

In addition, the statute makes it impossible for a trusted instructor or guidance counselor⁴¹ to respond

³⁹See L. Edel, Bloomsbury: A House of Lions 145-47 (1979); C. Hession, John Maynard Keynes (1984).

⁴⁰See A. Hodges, Alan Turing: The Enigma (1983).

⁴¹The statute incorporates by reference the definition of "teacher" found at Okla. Stat. tit. 70, §1-116 (1982): "Any person who is employed to
(Footnote Continued)

evenhandedly or perhaps even at all to student requests for counseling in regard to issues of homosexuality that arise for members of their family, friends, or for themselves.

These are only some examples of the potential scope of a law which singles out content-based expression for potential punishment. Indeed, the statute reflects an effort, reminiscent of the prohibitions on discussions of slavery, to hermetically seal the public schools from exposure to legitimate protected expression about an issue of major public importance. The effort is futile, since the issue is important in public debate and participation of students in gay rights advocacy in and outside the

(Footnote Continued)
serve as district superintendent, county superintendent, principal, supervisor, counselor, librarian, school nurse or classroom teacher..."

schools is both common and protected.⁴²
Yet the statute is nonetheless dangerous to the fundamental values of the First Amendment. By denying to teachers the freedom to say anything in any context

⁴²On numerous occasions, the courts have upheld the constitutional rights of gay student organizations denied official recognition by their universities. See, e.g., G.A.A. v. Bd. of Regents, 638 P.2d 1116 (Okla. 1981); Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976); Gay Lib v. Univ. of Missouri, 558 F.2d 848 (8th Cir. 1977), cert. denied sub nom. Ratchford v. Gray Lib, 434 U.S. 1080 (1978); Gay Student Services v. Texas A&M Univ. 737 F.2d 1317 (5th Cir. 1984). In each of these cases, it was held that the policies and purposes of the student organization did not "infringe reasonable campus rules, interrupt classes or substantially interfere with the opportunity of other students to obtain an education," Gay Lib v. Univ. of Missouri, 558 F.2d at 856 quoting Healy v. James, 408 U.S. 169, 189 (1972).

In Fricke v. Lynch, 491 F.Supp. 381 (D.R.I. 1980), the court overturned a high school principal's decision not to allow a student to escort his male lover to the senior prom. The Court rejected as a basis for exclusion the principal's asserted fear of a violent reaction from other students.

that might come to the attention of school children or personnel, if it does not condemn homosexuality and the gay rights movement, the state denies teachers the right to express their commitments to social change and scholarship outside the classroom, just as it denies students the right to a non-distorted, non-intimidating education.

IV. THE STATUTE'S OFFICIAL CONDEMNATION OF PARTICULAR BELIEFS, FAR FROM FURTHERING LEGITIMATE GOALS, UNDERMINES IMPORTANT CONSTITUTIONAL AND EDUCATIONAL VALUES

The mechanism by which this statute operates may be more subtle but is no less deadly to free discussion than the loyalty oaths and mandatory investigations struck down by this Court in the "subversive" teacher cases. By penalizing expression of views opposing a particular bias, it in effect sanctions

the biased position. Fear and outrage at homosexuality and the gay rights movement are volatile and dangerous, given their roots in religion and the conviction of moralistic truths.⁴³ The same fervor that attended the anti-communist witchhunts can be incited as to homosexuality.⁴⁴ Thus speech that might be unknown or disregarded or, at most, the subject of interested or even hostile comment, can explode into a major controversy about the fitness of a previously impeccable teacher. Difference of opinion, even disgust, can be transformed into unnecessarily disruptive confrontation.

⁴³See, e.g., the dissenting opinion below, 729 F.2d at 1276; Brief of the State of Oklahoma Amicus Curiae, at 22.

⁴⁴High schools are not immune. See, e.g., National Klan Leader Terms City Youth Recruiting Good, Okla. City Times, (Footnote Continued)

In short, the statute teaches intolerance, because the perception of official tolerance for or encouragement of intolerant behavior can have a powerful effect. A substantial literature suggests that indications of official resistance to court-ordered school desegregation remedies encouraged hostile, and sometimes violent, community reactions to the desegregation process. C. Willie and S. Greenblatt, Community Politics and Educational Change 324-28, 331 (1981); T. Pettigrew, Racially Separate or Together? 130 (1971). Reduction in hostility seems not to require officials to go out of their way to endorse the desegregation process, but

(Footnote Continued)
Jan. 26, 1978, at 1, col. 1, reporting on anti-gay organizing by the Ku Klux Klan in Oklahoma high schools.

merely to uphold normal legal processes.
 Willie and Greenblatt at 324.

This Court has noted that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Palmore v. Sidoti, ___ U.S. ___, 104 S.Ct. 1879, 1882 (1984).⁴⁵ Indeed, the central wisdom of the First Amendment is that:

[s]peech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

⁴⁵Palmore dealt with racial prejudice. Court around the country have applied the same principle in cases where societal prejudice against lesbian mothers was advanced as a reason to remove children from their custody. See, e.g., M.P. v. S.P., 169 N.Super. 425, 404 A.2d 1256, 1263 (N.J. Super. 1979) (if children remain with mother, despite societal prejudice, they may "emerge better equipped to search out their own standards of right and wrong, better able to see that the majority is not always correct in its moral judgments....").

Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949). The Oklahoma statute defies this basic constitutional principle. Moreover, it undermines the importance of the Constitution at a crucial point in the training of citizens. The fact that local public schools

are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

West Virginia State Bd. of Ed. v.

Barnette, 319 U.S. 624, 637 (1943).

Should we subject our children to the spectre of hatred and intolerance or plant the seeds for tolerance and freedom of spirit? The most fundamental aspirations of the first amendment demand that we cast our lot with the tasks of tolerance and the free play of ideas. The bleaker experiences of this nation

confirm that this is the only safe
course.

Freedom to differ is not limited
to things that do not matter much.
That would be a mere shadow of
freedom. The test of its
substance is the right to differ
as to things that touch the heart
of the existing order.

West Virginia State Board of Education v.
Barnette, 319 U.S. 624, 642 (1943).

CONCLUSION

For the foregoing reasons, this
Court should enforce the first amendment
and affirm the judgment of the court
below.

Respectfully
submitted,

Rhonda Copelon
Volunteer Staff
Attorney for
Center for Consti-
tutional Rights
CUNY Law School at
Queens College
200-01 42d Avenue
Bayside, NY 11361
(718) 357-7584

Anne E. Simon
(Counsel of
Record)
Sarah Wunsch
Center for
Constitutional
Rights
853 Broadway,
14th Floor
New York, NY
10003
(212) 674-3303

Attorneys for
Amici Curiae

* Counsel gratefully acknowledge the
assistance of John Copoulos and Johnathan
Katz, Center for Constitutional Rights;
Julia Devin, American University School
of Law; Paris Baldacci, David Barr,
Alicia Fagan, Laura Gentile, Deborah
Greenberg, Sandy Lowe, and Amy Pearlman,
CUNY Law School at Queens College; Phil
Bratnober; George Chauncey; and Andrea
Dworkin, in the preparation of this
brief.

14
No. 83-2030

Office - Supreme Court, U.S.
FILED

DEC 24 1984

ALEXANDER J. STEVAS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THE BOARD OF EDUCATION OF THE CITY OF
OKLAHOMA CITY, STATE OF OKLAHOMA,

v.

Appellant,

THE NATIONAL GAY TASK FORCE,

Appellee.

On Appeal from the United States Court of Appeals
for the Tenth Circuit

**BRIEF AMICUS CURIAE OF THE AMERICAN
ASSOCIATION OF UNIVERSITY PROFESSORS**

Of Counsel:

MATTHEW FINKIN
School of Law
Southern Methodist
University
Dallas, Texas 75275

ANN H. FRANKE
(Counsel of Record)
1012 14th Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 737-5900

RALPH S. BROWN
127 Wall Street
New Haven, Connecticut 06520
(203) 436-7675

Attorneys for Amicus Curiae

December 26, 1984



25442

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	6
SUMMARY OF ARGUMENT	6
ARGUMENT	
I. The Instant Statute's Prohibition of "Advocacy" Is Unconstitutionally Vague	7
II. The Key Statutory "Limitations" Are No Limi- tations At All	11
III. Legitimate State Interests in Protecting Chil- dren Do Not Justify the Statute's Broad Re- straints on Extramural Expression	17
CONCLUSION	19

TABLE OF AUTHORITIES

Cases:	Page
<i>Adamian v. Jacobsen</i> , 523 F.2d 929 (9th Cir. 1975)	2
<i>Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris</i> , 103 S. Ct. 3492 (1983)	2
<i>Baggett v. Bullitt</i> , 377 U.S. 360 (1964)	8
<i>Board of Education v. Vail</i> , 104 S. Ct. 2144 (1984)	2
<i>Board of Regents v. Roth</i> , 408 U.S. 564 (1972)	2
<i>Butler v. Michigan</i> , 352 U.S. 380 (1957)	18
<i>Carey v. Population Services International</i> , 431 U.S. 678 (1977)	18, 19
<i>City of Madison Joint School District v. Wisconsin Employment Relations Commission</i> , 429 U.S. 167 (1976)	2
<i>Connick v. Meyers</i> , 461 U.S. 138 (1983)	12
<i>Cramp v. Board of Public Instruction</i> , 368 U.S. 278 (1961)	8
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968)	5
<i>Givhan v. Western Line Consolidated School District</i> , 439 U.S. 410 (1979)	2
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967)	2, 8
<i>Korf v. Ball State University</i> , 726 F.2d 1222 (7th Cir. 1984)	3
<i>Krotkoff v. Goucher College</i> , 585 F.2d 675 (4th Cir. 1978)	2
<i>Leftwich v. Harris-Stowe State College</i> , 540 F. Supp. 37 (E.D. Mo. 1982), <i>rev'd in part</i> , 702 F.2d 686 (8th Cir. 1983)	5
<i>Minnesota State Board for Community Colleges v. Knight</i> , 104 S. Ct. 1058 (1984)	2
<i>Musser v. Utah</i> , 333 U.S. 95 (1948)	9
<i>National Gay Task Force v. Board of Education of the City of Oklahoma City</i> , 720 F.2d 1270 (10th Cir. 1984)	6
<i>Perry v. Sindermann</i> , 408 U.S. 593 (1972)	2

TABLE OF AUTHORITIES—Continued

	Page
<i>Pickering v. Board of Education</i> , 391 U.S. 563 (1968)	11, 12
<i>Shelton v. Tucker</i> , 364 U.S. 479 (1960)	8
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958)	8, 11
<i>Tilton v. Richardson</i> , 403 U.S. 672 (1971)	2
<i>West Virginia Board of Education v. Barnette</i> , 377 U.S. 624 (1943)	14
<i>Whitehill v. Elkins</i> , 389 U.S. 54 (1967)	2
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981)	4
Constitutional Provisions and Statutes:	
United States Constitution	
First Amendment	<i>passim</i>
Oklahoma Statutes	
title 70 § 6-103 (A)	17, 18
title 70 § 6-103.15	<i>passim</i>
ch. 13 § 1677 (1931)	15
Other Authorities:	
AAUP POLICY DOCUMENTS AND REPORTS (1984)	
1940 <i>Statement of Principles on Academic Freedom and Tenure</i>	2, 3
1966 <i>Statement on Professional Ethics</i>	3
1976 <i>Statement on Discrimination</i>	13
<i>Academic Freedom and Tenure: Broward Junior College (Florida)</i> , 55 AAUP BULL. 71 (1969)	10
R. Brown, <i>LOYALTY AND SECURITY</i> (1958)	8
<i>Developments in the Law: Public Employment</i> , 97 HARV. L. REV. 1611 (1984)	13
Note, <i>Free Speech Rights of Homosexual Teachers</i> , 80 COLUM. L. REV. 1513 (1980)	13
Note, <i>The Right of Privacy and Other Constitutional Challenges to Sodomy Statutes</i> , 15 U. TOL. L. REV. 811 (Winter 1984)	13
Note, <i>The Rights of Gay Student Organizations</i> , 10 J. COLL. & UNIV. L. 397 (Winter 1983-84)	13

TABLE OF AUTHORITIES—Continued

	Page
R. O'Neil, <i>Academic Libraries and the Future: A President's View</i> , 45 COLL. AND RESEARCH LIBRARIES 184 (May, 1984)	4
E. Reutter, THE SCHOOL ADMINISTRATOR AND SUBVERSIVE ACTIVITIES (1951)	4
R. Rivera, <i>Recent Developments in Sexual Preference Law</i> , 30 DRAKE L. REV. 311 (1980-81)	13
E. Thorndike, THE TEACHING OF CONTROVERSIAL SUBJECTS (1937)	13, 14

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2030

THE BOARD OF EDUCATION OF THE CITY OF
OKLAHOMA CITY, STATE OF OKLAHOMA,
v. *Appellant,*

THE NATIONAL GAY TASK FORCE,
Appellee.

On Appeal from the United States Court of Appeals
for the Tenth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN
ASSOCIATION OF UNIVERSITY PROFESSORS

This brief *amicus curiae* is filed on behalf of the American Association of University Professors with the consent of both parties.

INTEREST OF AMICUS CURIAE

The instant case raises central questions of the free speech rights of public employees, specifically primary and secondary school teachers in Oklahoma whose rights of public advocacy are impaired under the challenged statute. Founded in 1915, the American Association of University Professors (AAUP) is committed to advancing the standards, ideals, and welfare of teachers and research scholars in universities and colleges. The academic freedom and civil liberties of faculty members in

higher education are closely linked to those of teachers in primary and secondary schools, and the AAUP has often participated as *amicus curiae* in this Court in cases involving both settings.¹

One of the AAUP's central tasks, frequently undertaken in concert with other national organizations, is the formulation of statements intended to establish minimum standards of institutional practice in higher education. Paramount among these is the 1940 *Statement of Principles on Academic Freedom and Tenure* (1940 *Statement*),² drafted jointly with the Association of American Colleges. The 1940 *Statement*, endorsed by over 100 learned societies and professional organizations, has guided faculties, administrators, boards of trustees, and courts in matters of academic freedom and tenure.³ In the section on academic freedom, the 1940 *Statement* endorses the rights of college teachers as citizens:

The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. . . . [He] should

¹ *Minnesota State Bd. for Community Colleges v. Knight*, 104 S. Ct. 1058 (1984); *Board of Educ. v. Vail*, 104 S. Ct. 2144 (1984); *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 103 S. Ct. 3492 (1983); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979); *City of Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Whitehill v. Elkins*, 389 U.S. 54 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

² Reprinted in AAUP POLICY DOCUMENTS AND REPORTS 3 (1984). A copy of this volume has been lodged with the clerk.

³ See, e.g., *Tilton v. Richardson*, 403 U.S. 672, 681-2 (1971); *Krotkoff v. Goucher College*, 585 F.2d 675 (4th Cir. 1978); *Adamian v. Jacobson*, 523 F.2d 929 (9th Cir. 1975).

at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.⁴

The AAUP's 1966 *Statement on Professional Ethics*⁵ similarly recognizes the rights of faculty members as citizens:

V. As a member of his community, the professor has the rights and obligations of any citizen. . . .

⁴ AAUP POLICY DOCUMENTS AND REPORTS 3-4 (1984). Further elaboration is found in an interpretive comment issued in 1940 by the framers of the 1940 *Statement* which indicates:

If the administration of a college or university feels that a teacher has not observed the admonitions of Paragraph (c) of the section on Academic Freedom and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning his fitness for his position, it may proceed to file charges under Paragraph (a) (4) of the section on *Academic Tenure*. In pressing such charges the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

In 1964, the AAUP's Committee A on Academic Freedom and Tenure issued a *Statement on Extramural Utterances* which provides *inter alia* that:

The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his position. Extramural utterances rarely bear upon the faculty member's fitness for his position. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar.

AAUP POLICY DOCUMENTS AND REPORTS 4-6 (1984).

⁵ AAUP POLICY DOCUMENTS AND REPORTS 133-4 (1984). The 1966 *Statement on Professional Ethics* was relied on recently in *Korf v. Ball State University*, 726 F.2d 1222, 1227 (7th Cir. 1984), a case upholding the dismissal of a faculty member for the sexual exploitation of students.

When he speaks or acts as a private person he avoids creating the impression that he speaks or acts for his college or university.

We approach the Oklahoma statute in this brief from the standpoint of its seriously flawed restrictions on the extramural utterances of teachers. When public school teachers speak extramurally as citizens, their rights and obligations converge with those of faculty members as citizens.⁶ By virtue of its long and active interest in the freedom of extramural faculty speech, the AAUP is well-qualified to address the Court as *amicus curiae*.

Restrictions on extramural advocacy by public school teachers are a source of special concern to faculty members for four reasons. First, history suggests that constraints initially intended to apply only to public school teachers are often extended to public colleges and universities. The teacher loyalty oath statutes enacted with frequency in the 1920s and 1930s applied in twenty-one states also to faculty members at public institutions of higher education.⁷ The Massachusetts legislature purported to extend its loyalty requirement even to private higher education, reaching Harvard, M.I.T., and scores of other institutions.⁸ The "anti-evolution" law invali-

⁶ While the younger age of the students may justify placing greater limits on in-class speech by public school teachers than by faculty, see, e.g., *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981), we do not concede the constitutionality of the Oklahoma statute as applied to speech in the classroom.

⁷ Edmund Reutter, *THE SCHOOL ADMINISTRATOR AND SUBVERSIVE ACTIVITIES* 68 (1951).

⁸ See, Robert M. O'Neil, *Academic Libraries and the Future: A President's View*, 45 *COLL. AND RESEARCH LIBRARIES* 184, 187-8 (May, 1984). O'Neil, president of the University of Wisconsin System, Madison, urges university librarians to champion intellectual freedom in the primary and secondary school libraries and public libraries. "Some recent initiatives of the moral majority have looked initially at problems in public school classrooms but have not been wholly unmindful of possibly fertile ground in higher education as well." *Id.* at 188.

dated by this Court in *Epperson v. Arkansas*, 393 U.S. 97 (1968), governed not only primary and secondary schools, but also state-supported colleges and universities. The limits imposed by Oklahoma on the advocacy of its public school teachers may well be extended in that state or elsewhere to faculty members. Second, links in employment may exist between faculty members and public school teachers. Some faculty members have taught, or intend to teach, in the secondary schools. A two-year community college may, for example, draw its faculty in part from the ranks of the public high school teachers.⁹ Restrictions on public school teachers may discourage professors, and others, from teaching at the primary and secondary levels.

Third, colleges and universities are the training grounds for public school teachers. Faculty members offer values of intellectual inquiry and community participation to future teachers, lessons which may be rendered meaningless if state laws inhibit teachers from public advocacy on particular subjects. The Oklahoma statute at issue, moreover, covers even student teachers, who are advanced undergraduates performing supervised classroom teaching in partial fulfillment of their degree requirements. Supervising faculty members may have to counsel student teachers about the statutory restrictions on advocacy. And fourth, primary and secondary school teachers, as citizens, share with faculty a special perspective enriching their public comments on matters dealing with education. For these reasons, the AAUP partici-

⁹ In an employment discrimination dispute involving a faculty member from Harris-Stowe State College in Missouri, the district court observed:

Many faculty members, including the plaintiff, followed a career path through a tenured position with the St. Louis Public Schools to a position in Harris-Stowe.

Leftwich v. Harris-Stowe State College, 540 F. Supp. 37, 39 (E.D. Mo. 1982), *rev'd in part*, 702 F.2d 686 (8th Cir. 1983).

pates as *amicus curiae* in support of the decision of the court of appeals in this case.

STATEMENT OF THE CASE

The National Gay Task Force challenges the constitutionality of OKLA. STAT. tit. 70 § 6-103.15 (Supp. 1984). The statute countenances the dismissal of public school teachers, student teachers, and teachers' aides who, *inter alia*, advocate, encourage, or promote "public or private homosexual activity." If the advocacy is conducted publicly, i.e., in a manner creating a substantial risk that fellow employees or school children will become aware of it, then the employee may be dismissed as "unfit." Applicants for employment as teachers, student teachers, or teachers' aides may be rejected on the same basis.

The district court found no constitutional infirmities in the statute, concluding that it did not infringe protected privacy interests, violate the Establishment or Equal Protection clauses, or suffer from vagueness or overbreadth problems under the First Amendment. The court of appeals reversed in part, finding that the statutory prohibition on advocacy, along with the similar prohibitions on encouragement and promotion, was overbroad. It severed these three words from the remainder of the statute. *National Gay Task Force v. Board of Education of the City of Oklahoma City*, 720 F.2d 1270 (10th Cir. 1984).

SUMMARY OF ARGUMENT

The Oklahoma statute under challenge is defective in its flat prohibition of "advocacy" concerning homosexuality. The restriction applies most significantly to extramural speech in the public arena by teachers and prospective teachers. It inhibits all expressions, whether scholarly, artistic, or political, which might be construed as favorable to homosexuality and which might reach the

public. The fact that advocacy concerning homosexuality may address sodomy, which is a crime, does not save the statute from First Amendment infirmity. Nor do the "unfitness" factors narrow the statute. The factor looking to "adverse effect" on school employees or children utterly disregards the fact that meaningful expression challenging the status quo may often cause discomfort to the listener. Tests under the First Amendment, however, cannot judge extramural utterances on matters of public concern on the basis of the acceptability of the speakers' views. The statutory factor looking to the tendency of the advocacy to encourage similar conduct in the young is circular in its reasoning and ill-conceived in its definition. In punishing a teacher's extramural advocacy which tends to encourage advocacy, as opposed to homosexual acts, in the young, the statute simply multiplies its vagueness and overbreadth. While the state has a legitimate interest in protecting children, the Oklahoma Act extends far beyond this purpose in its broad restraints on extramural advocacy. The advocacy need not, by definition, even be likely to come to the attention of children. We urge affirmance of the decision of the court of appeals, which severed "advocating . . . encouraging or promoting" from the statutory definition of "public homosexual conduct."

I. The Instant Statute's Prohibition of "Advocacy" Is Unconstitutionally Vague.

The instant statute proscribes certain kinds of "advocacy" on pain of loss of current or future employment. The prohibited expression is "advocacy" of "public or private homosexual activity" which "advocacy" bears a substantial risk of coming to the attention of students or school employees—that is, advocacy of a public character. In addition, the state has attached four conditions upon which appointment may be denied or terminated for such expression. Two of these bearing special attention

are addressed in the following section. Here we examine the general restriction on "advocacy," and in particular its effects on extramural expressions of current and prospective teachers.

The proscription of "advocacy" is not a novel question for this Court. The prohibition of the employment of teachers and professors who "advocate" disfavored ideas has been condemned on the grounds advanced here—the failure to inform the teacher or professor what is forbidden. *Baggett v. Bullitt*, 377 U.S. 360 (1964), *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961). The further evil in such a scheme is that it inhibits the exercise of individual freedom. Students, teachers, and professors, having to guess at its meaning, necessarily will "tend to steer far wider of the unlawful zone." *Speiser v. Randall*, 357 U.S. 513 (1958).

The loyalty and anti-subversion cases challenging legislation restrictive of teachers' rights of advocacy¹⁰ culminated in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). There the Court struck down a New York law, similar in operation to the instant Oklahoma statute, which disqualified from the civil service and from employment in the educational system "any person who advocates the overthrow of government by force, violence, or any unlawful means, or publishes material advocating such overthrow. . . ." 385 U.S. at 593. The dismissal statute referred to the penal code to define the nature of sedition, treason, and criminal anarchy, just as the Oklahoma statute at issue incorporates by reference the state anti-sodomy law in attempting to specify "public homosexual activity." The vagueness of the proscription on "advocacy" was central to the Court's invalidation of the New York statute.

Under the Oklahoma scheme, what is the teacher or prospective appointee forbidden publicly to say? Could

¹⁰ See R. Brown, *LOYALTY AND SECURITY* (1958); *Shelton v. Tucker*, 364 U.S. 479 (1960).

she advocate, for example, the decriminalization of consensual adult homosexual relationships? The Board of Education argues that public advocacy of legal change is not proscribed by the law. Brief of Appellant at 33. But such limitation is not at all apparent from the face of the statute, for advocacy of decriminalization surely incidentally encourages some to engage in the conduct made criminal, and that, argues the Board, is what the Act does proscribe. Justice Rutledge observed this phenomenon dissenting in *Musser v. Utah*, 333 U.S. 95, 101 (1948):

It is axiomatic that a democratic state may not deny its citizens the right to criticize existing laws and to urge that they be changed. And yet, in order to succeed in an effort to legalize polygamy it is obviously necessary to convince a substantial number of people that such conduct is desirable.

Even if advocacy of legal change alone is carved out as a narrow exemption to the Act, change in law presupposes and flows from an attitudinal change on the part of the body politic. And advocacy of attitudinal change would seem rather clearly to be reached by the Act. Such calls can be made not only in public polemics, but in works of serious scholarship, art, and literature, all of which would be proscribed by the instant Act if the content is taken by public school officials to smack too much of "advocacy." Is *Uncle Tom's Cabin* a form of "advocacy"? Does *Inherit the Wind* "advocate" academic freedom? Is *The Children's Hour* too sympathetic and so too "encouraging" of its protagonist, Martha Dobie, a lesbian schoolteacher hounded to suicide by public bigotry and personal guilt?

The dilemma for teachers contemplating extramural utterance posed by the vague proscription of "advocacy" mirrors that of the university students who are prospective teachers, and their faculty advisors. The serious undergraduate or graduate student will routinely en-

counter homosexual themes and overtones in the study of literature and art, in sociology, anthropology, psychology, and, especially with the rise of politically active homosexual groups, in political science. The student would be expected to address these matters in classroom discussion and supervised research, and could also wish to speak on them in extra-curricular activities.

To be sure, the instant statute requires examination of the manner of the utterance; that is, whether it creates a "substantial risk" of coming to the public school's attention. Thus the serious university student is told, in effect, that she may research upon homosexual themes in academic disciplines; but she may not broadcast the results of her research "too" widely, nor give "too" public an exposure to her work, for fear that her words may come to the attention of prospective employers and be taken as impermissible "advocacy" if her conclusions are too supportive or "encouraging" of homosexual relationships.

Quite plausible hypotheticals about the limits of "advocacy" in the university by prospective teachers come readily to mind.¹¹ Should an education major publish a book or article about the status of homosexuals in America? Should she write a review sympathetic to the portrayal of Martha Dobie in a theatrical production of *The Children's Hour*? Should she participate in a debate on gay rights? How should a faculty member advise a student contemplating these activities?

The Oklahoma law breathes no hint of an answer to the most obvious situations of the Act's immediate application on campus. Nor can this Court say with any

¹¹ An actual example may be found in *Academic Freedom and Tenure: Broward Junior College (Florida)*, 55 AAUP BULL. 71, 76 (1969) (Instructor who did not practice homosexuality but who expressed the opinion, in the question portion of a public lecture open to students, that homosexuals were human beings who should be tolerated, was denied reappointment for the expression of "beliefs contrary to accepted social patterns" at the college).

assurance that such activity is not reached by the Act. The student teacher, education major, their faculty advisors, as well as current teachers, are left entirely to guess at what is proscribed.

The consequences are those this Court adverted to more than twenty-five years ago in *Speiser v. Randall*, supra. The conscientious individual, incapable of ascertaining where the line is to be drawn, must tend to steer far wider of the unlawful zone. This consequence will directly affect institutions of higher education, for it contributes to a dampening of robust student debate, scholarly exploration, and even extra-curricular activity on the part of those considering the prospect of employment in Oklahoma's public schools. The extramural utterances of individuals currently employed as teachers are likewise impaired.

II. The Key Statutory "Limitations" Are No Limitations At All.

The Board of Education argues that the instant Act is saved because the legislature has appended additional limitations that supply a sufficient "nexus" between "advocacy" and professional fitness, allegedly consistent with this Court's holding in *Pickering v. Board of Education*, 391 U.S. 563 (1968). Upon examination, two key such limitations, the requirement of "adverse affect" and the requirement that the speech tend to "encourage" students to similar conduct, turn out to suffer from the same infirmities of vagueness and overbreadth which mar the proscription of "advocacy."

A. The Requirement of "Adverse Affect" Is Unconstitutionally Vague.

What is the "adverse affect" upon students or co-workers that permits the State to disqualify a prospective teacher from engaging in otherwise protected speech? The

Board of Education does supply a refinement—and it should give pause:

Teacher advocacy [w]hen it comes to the attention of students, given the significant "role model" function which teachers are called upon to perform, it is likely to engender disrespect for law as an institution, the social responsibilities of citizenship, and the political governmental process as a whole. This is true, of course, even if imminent lawless action is not produced. When it comes to the attention of other teachers or co-workers, it is likely to produce sufficient controversy, suspicion, and mistrust so as to threaten employee discipline, co-worker harmony, and that personal loyalty and confidence requisite to particularly close employee relationships.

Brief of Appellant at 34-5 (emphasis in original). Of primary concern here is the proposed test of "controversy" to one's co-workers and superiors as working a constitutionally sufficient "adverse effect."

The Board of Education argues that the proposed test is supported in this Court's decision in *Pickering*. Amicus AAUP respectfully disagrees. In *Pickering*, this Court indicated that the interests of the State as employer in regulating the speech of its employees differ from its interests in regulating the speech of the citizenry at large—and that a balance needs be struck. *Id.* at 568. The state's interest lies in promoting the efficiency of the public service, *id.*, which the Court identified as being served by maintaining "discipline by immediate supervisors" and "harmony among co-workers." *Id.* at 570. See *Connick v. Meyers*, 461 U.S. 138 (1983). Importantly, the Court has declined to accept the accusation that the fomenting of "controversy" in commenting upon a matter of public interest *simpliciter* disserved the state's interest in maintaining an efficient school system. In *Pickering*, the Court rather clearly signaled that the state interest in discipline and harmony is not validly implicated by speech

directed to general matters of public concern. The status and rights of homosexuals are plainly matters within the sphere of current public concern.¹²

What the Board of Education advances here, therefore, is a constitutionally stunning proposition: that the otherwise protected speech of a prospective teacher, and the extramural speech of a current teacher, may be relied upon to deny or terminate employment if it is sufficiently controversial to produce "disharmony" among co-workers.¹³

At one sweep all the law this Court has announced with respect to the expressive rights of teachers and professors is reduced to an irrelevance. An advocate upon any controversial subject could be disqualified not because the speech fell afoul of any test of lawlessness, not because

¹² See, e.g., R. Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311 (1980-81); *Developments in the Law: Public Employment*, 97 HARV. L. REV. 1611, 1754 n.83 (1983); Note, *Free Speech Rights of Homosexual Teachers*, 80 COLUM. L. REV. 1513 n.7 (1980); Note, *The Right of Privacy and Other Constitutional Challenges to Sodomy Statutes*, 15 U. TOL. L. REV. 311 (Winter 1984); Note, *The Rights of Gay Student Organizations*, 10 J. COLL. & UNIV. L. 397 (Winter 1983-84). The AAUP has condemned discrimination against faculty members on the basis of sexual or affectional preference. 1976 *Statement on Discrimination*, AAUP POLICY DOCUMENTS AND REPORTS 73 (1984).

¹³ As Edward C. Thorndike put it:

A controversial subject oftenest means one where the opinions of fairly competent persons differ and are held with some pertinacity and vehemence. It is used especially where the division of opinion relates to matter of acknowledged public concern, such as, in the past, Protestantism, witchcraft, the divine right of kings, slavery, property requirements for suffrage, or free schools. Among such, now, are tariffs, government ownership of public utilities, international court, the New Deal, divorce, sterilization of idiots, insane, and criminals of certain sorts. . . . More broadly, a controversial subject is any that causes conflict or dispute, even though all the really competent persons are on one side, even though the conflict is

it reflected any want of scholarship, and not because it lacked in moderation or restraint in any way, but because one's prospective colleagues or superiors found the advocate's position upon a general question of public policy too "controversial" and so "disharmonious." But to make appointment contingent upon the degree of approval of one's social, economic, or political views by one's co-workers or supervisors is to eviscerate the First Amendment.

Suffice it to say, as this Court did in *West Virginia Board of Education v. Barnette*, 377 U.S. 624, 683 (1943) (emphasis added):

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to *free speech*, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Neither does one's exercise of free speech upon a general question of public policy depend upon the majority sentiment of one's co-workers or administrators.

To be sure, as the Board of Education stresses, the instant statute concerns advocacy bearing upon conduct currently declared to be criminal. Although that does narrow the range of possible governmental proscription, it is qualitatively no limitation at all. The criminalization of the conduct only reflects the fact that there are very deeply held societal views concerning it, and any challenge to those views is likely to be highly "controversial." The deficiency of reliance on the criminal nature of

waged with restraint and urbanity, even though the subject is caviar to the general.

E. Thorndike, *THE TEACHING OF CONTROVERSIAL SUBJECTS* 1-2 (1937).

sodomy can be illustrated by returning to an Oklahoma criminal law of some years ago and substituting the reference of that law in the template afforded by the instant Act. Under Oklahoma Stat. 1931, ch. 13, § 1677, miscegenation was prohibited. Anyone who married in violation of the law was guilty of a felony. *Id.* § 1678. Anyone who performed the ceremony was guilty of a felony. *Id.* § 1679. Even the clerk who issued a license was guilty of a misdemeanor. *Id.* § 1680. The statutory scheme leaves no doubt about the deeply felt societal values of the time. Could not the state have thus enacted a law, anticipating the instant one verbatim, prohibiting "public miscegenetic conduct" defined as "advocating, soliciting, imposing, encouraging, or promoting public or private miscegenetic activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees" and subject to the same limitations as the instant Act? The authorship of plays, books, or articles commending, condoning, or tolerating racially mixed marriages would certainly have been sufficiently disquieting so to justify the exclusion of an otherwise qualified individual from employment. Once the Court accepts the idea that teachers can be prohibited from advocacy so long as the advocacy touches upon currently declared criminal conduct then, to a large extent, the resulting constitutional rule is that the social status quo can occasion no utterance for change if one desires to be a public school teacher.

In sum, the fact that the proscribed utterance deals with conduct that is at once criminal and controversial supplies no guidance about what may be said without crossing the line. On the contrary, inasmuch as the permissibility of the utterance may turn upon the subjective reaction of unknowable prospective co-workers, the standard to which one must adhere is unknowable virtually by definition.

B. The Requirement that the Speech Must "Tend to Encourage" is Unconstitutionally Vague.

The solicitation of students to engage in a homosexual relationship with the solicitor is plainly impermissible conduct, as the Court of Appeals held; and so it is important to stress that the "encouragement" requirement applies to limit otherwise protected public advocacy. But what is it the speech must tend to encourage? "Similar conduct" says the law. But "conduct" is defined by the law as "advocacy." So all the infirmities in the proscription of advocacy are merely reincorporated into the ostensible "limitation."

This limitation to "encouragement" is susceptible of two interpretations. Under the first, scrutiny must be given to the frequency or repetition of the utterance. Has it been said often "enough" to dispose students to similar views? Presumably, a single favorable review in the local press of a book, play, or motion picture with a homosexual theme would be *de minimis*—though we cannot know; but if it is, at what point is the prospective teacher to know that she has crossed the line so to be disabled from appointment? And an unascertainable standard will surely discourage individuals from reviewing such works at all no matter how widely read, praised or condemned they are elsewhere.

Alternatively, this "limitation"—read in conjunction with the threshold requirement of "advocacy"—requires scrutiny not only of the quantity of utterance but of its quality; that is, whether it is of a nature effectively to sway student opinion or belief. By this reading, the statute would allow a school board to refuse to hire a graduate not because she wrote a series of essays that engendered controversy alone, but because the content of the essays additionally might dispose students to similar

expression—that is, whose arguments were compelling or whose style seemed persuasive.

If this is what the statute means, one who "advocates" weakly or badly may be hired; one who does so powerfully or skillfully may not. By this Orwellian device, the unpersuasive or foolish advocate would meet the statutory test of professional fitness, while the persuasive or powerful advocate would be professionally unfit.

It suffices to say that an assessment of likely impact is a matter of rhetorical taste or political sensibility. Accordingly, this seeming "limitation" supplies no standard to guide the current or prospective teacher about what may be published or said.

III. Legitimate State Interests in Protecting Children Do Not Justify the Statute's Broad Restraints on Extramural Expression.

The Oklahoma statute was passed without the recording of legislative history and so one can only speculate on its purposes. The Brief of Appellant Board of Education suggests four concerns to which the statute was directed:

1. avoiding disruption in the schools;
2. preventing school children from committing homosexual sodomy;
3. fostering children's normal process of social integration; and
4. assuring that children develop attitudes of respect for the law.

Brief of Appellant at 29-30. With respect to the first, the potentially disruptive effects, if any, of extramural expressions by teachers may be dealt with under the comprehensive Oklahoma teacher dismissal statute, OKLA. STAT. ANN. tit. 70, § 6-103(A) (Supp. 1984). The statute directed to teachers' homosexual activity and conduct is repetitive of the general teacher dismissal statute, and indeed has never been utilized. To the extent that the

state seeks to preserve order in the schools by dismissing disruptive teachers, § 6-103(A) can comprehensively achieve this purpose.

The three other purposes proffered by the board of education concern the well-being of children. The statutory language, however, goes beyond children's interests and evinces a constitutionally unjustifiable solicitude for the sensibilities of a teacher's fellow employees. Both the definition of "public homosexual conduct" and the first "unfitness" factor can be satisfied by advocacy likely to come to the attention only of school employees, or which "adversely affects" school employees. It is curious indeed that a statute directed to protecting children's interests concerns itself so extensively with other adults. The statute's potential for punishing extramural utterances not even heard by children, nor adversely affecting them, casts serious doubt on the assumption that its major objectives are directed to protecting the young.

Assuming, however, that the statute advances children's interests, this purpose cannot serve as a valid basis for broad constraints on extramural speech by teachers. Justice Frankfurter emphasized this in *Butler v. Michigan*, 352 U.S. 380 (1957), writing for the Court in striking down a state law prohibiting the possession or distribution of printed material tending to corrupt the morals of youth or incite them to "depraved" acts:

The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig.

352 U.S. at 383. The same principle underlay the majority opinion in *Carey v. Population Services*, 431 U.S. 678, 701 (1977), where the state assertion that the advertising of contraceptives would encourage the young toward illicit sexual behavior was considered an insufficient basis for a total ban on advertising. The statute here

can punish speech at least as unlikely as the advertisements in *Carey* to promote sexual behavior in children. While the separate opinions in *Carey* by Justices White, Powell, and Stevens acknowledge that carefully tailored restrictions might appropriately protect youth or curtail offensive speech in some ways, the Oklahoma statute is not so limited. It broadly restricts "advocacy," including extramural utterances, and looks to a generalized "adverse affect" on school employees or children. Once again the house has been burned to roast the pig.

Accordingly, we submit that the court of appeals correctly severed the terms advocacy, encouragement, and promotion from the Oklahoma statute. By this modest and constitutionally-compelled change, the extramural expressive rights of teachers are preserved. The mere assertion that the statute is intended to protect the young cannot alone serve to defeat countervailing central First Amendment values.

CONCLUSION

The Board of Education contends that the instant statute is justified by the need to insulate the schools from an atmosphere of "disharmony, suspicion, and mistrust" flowing from speech that is controversial but otherwise permissible under settled constitutional principles. Amicus AAUP can readily conceive of how retention of a teacher with dissenting sexual-social views can engender disharmony with a majority of co-workers of a contrary view. But the resulting "disharmony" is no different from the disharmonies that flow from the heterogeneity of social, economic, religious or political views that citizens are free to espouse. Government can no more disfavor the employment of a teacher because a majority of her co-workers dislike her views on homosexuality than it can deny employment to a teacher because a majority of her co-workers dislike her views on capital punishment, public ownership of the means of production, or transubstantiation.

However, amicus AAUP does believe that suspicion and mistrust are indeed implicated by the instant Act—for it is the statute that will engender those consequences. Teachers in Oklahoma's public schools, and university students contemplating that career, are now suspect in their beliefs and expressions about a currently controversial social question. They must now be concerned about what they say or write, that their scholarly, journalistic, novelistic, or extracurricular projects may be measured by an unascertainable standard of "advocacy" and "controversiality" so to deny them employment in the public schools.

For the foregoing reasons, the judgment of the court of appeals severing "advocating . . . encouraging or promoting" from the definition of "public homosexual conduct" in OKLA. STAT. tit. 70 § 6-103.15(A) (2) should be affirmed.

Respectfully submitted,

Of Counsel:

MATTHEW FINKIN
School of Law
Southern Methodist
University
Dallas, Texas 75275

ANN H. FRANKE
(Counsel of Record)
1012 14th Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 737-5900

RALPH S. BROWN
127 Wall Street
New Haven, Connecticut 06520
(203) 436-7675

*Attorneys for Amicus Curiae
American Association of
University Professors*

December 26, 1984

JAN 5 1985

ALEXANDER L. STEVENS,
CLERK

16
No. 83-2030

In the Supreme Court of the United States

OCTOBER TERM, 1984

**THE BOARD OF EDUCATION OF THE CITY OF
OKLAHOMA CITY, STATE OF OKLAHOMA,**
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

**On Appeal from the United States Court of Appeals,
Tenth Circuit**

REPLY BRIEF OF APPELLANT

LARRY LEWIS*

4001 N. Lincoln, Suite 410
Oklahoma City, Oklahoma 73105
(405) 521-1276

JAMES B. CROY

P.O. Box 10798
Midwest City, Oklahoma 73140
(405) 737-5673

DENNIS W. ARROW

Oklahoma City University Law School
2501 N. Blackwelder
Oklahoma City, Oklahoma 73106

Attorneys for Appellant

January, 1985

***Counsel of Record**

TABLE OF CONTENTS

	PAGE
ARGUMENT:	
I. The only "viewpoint" targeted for regulation by the challenged statute is the teacher-expressed "viewpoint" that persons should commit a specific crime	1
II. Teachers' interests in advocating the specified crime are outweighed by state interests in fostering the broad goals of public education	7

TABLE OF AUTHORITIES

Cases	PAGE(S)
<i>Acanfora v. Board of Education</i> , 359 F.Supp. 843 (D. Md. 1973)	3
<i>Ambach v. Norwich</i> , 441 U.S. 68 (1979)	3
<i>Board of Education, Island Trees Union Free School District No. 26 v. Pico</i> , 457 U.S. 853 (1982)	3, 9
<i>Board of Education of Long Beach v. Jack M.</i> , 566 P.2d 602 (Cal. 1977)	6
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954)	3
<i>Coupeville School District No. 204 v. Vivian</i> , 677 P.2d 192 (Wash. App. 1984)	6
<i>Erznoznik v. City of Jacksonville</i> , 422 U.S. 205 (1975)	9
<i>F.C.C. v. Pacifica Foundation</i> , 438 U.S. 726 (1978)	9

AUTHORITIES CONTINUED

PAGE(S)

<i>Gay Activists Alliance v. Board of Regents of the University of Oklahoma</i> , 638 P.2d 1116 (Okla. 1981) _____	4
<i>Ginsberg v. New York</i> , 390 U.S. 629 (1968) _____	9
<i>Kolender v. Lawson</i> , 103 S.Ct. 1855 (1983) _____	3
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923) _____	9
<i>Morrison v. State Board of Education</i> , 461 P.2d 375 (Cal. 1969) _____	6
<i>Pickering v. Board of Education</i> , 391 U.S. 563 (1968) _____	7
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925) _____	8
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982) _____	3
<i>San Dieguito Union High School District v. Commission on Professional Competence</i> , 185 Cal.Rptr. 203 (1982) _____	6
<i>Secretary of State v. Joseph H. Munson Co.</i> , 104 S.Ct. 2839 (1984) _____	5
<i>State ex rel. York v. Turpin</i> , 681 P.2d 763 (Okla. 1984) _____	3
<i>United Public Workers v. Mitchell</i> , 330 U.S. 75 (1947) _____	3
Statutes	
Okla. Stat., Title 70, Sec. 6-103.15 _____	passim
Miscellaneous	
Note, <i>Free Speech Rights of Homosexual Teachers</i> , 80 Columbia L. Rev. 1513 (1984) _____	8
KIRP and YUDOF, <i>Educational Policy and the Law</i> (1982) _____	8
SPARLING, <i>Opinions of the Oklahoma Attorney General: An Analysis</i> , 6 Okla. City U. L.R. 373 (1981) _____	3

No. 83-2030

In the
Supreme Court of the United States
OCTOBER TERM, 1984

THE BOARD OF EDUCATION OF THE CITY OF
OKLAHOMA CITY, STATE OF OKLAHOMA,
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

On Appeal from the United States Court of Appeals,
Tenth Circuit

REPLY BRIEF OF APPELLANT

I. THE ONLY "VIEWPOINT" TARGETED FOR REGULATION BY THE CHALLENGED STATUTE IS THE TEACHER-EXPRESSED "VIEWPOINT" THAT PERSONS SHOULD COMMIT A SPECIFIC CRIME.

Notwithstanding the statutory analysis of the Gay Task Force (see Appellee's Brief at 13, 18-20, 27), expressions of sympathy to the homosexual rights cause, exercises of the right to petition the Government for legislative change, condemnations of physical violence against homosexuals, joining the National Democratic Party, teaching the works of Wilde and Keynes, and the advocacy of any "viewpoint" not involving the commission of the specific crime of homosexual sodomy are not even regulated¹ by the challenged

statute. While Appellant takes no issue with Appellee's preferred characterization of the challenged statute as an "anti-advocacy" statute (see Appellee's Brief, at 8, n.7)² it will contest any implication that the proscribed advocacy is of anything other than the commission of a specific criminal act.³

¹Contrary to Appellee's suggestion that the challenged statute effects "flat censorship" within its sweep (see Appellant's Brief at 22), numerous types of advocacy, *even of criminal homosexual sodomy*, are clearly permitted pursuant to it. Advocacy of the specified crime which is not likely to come to the attention of school children or school employees", 70 Okla. Stat. Sec. 6-103.15(A)(2), is clearly not proscribed. Nor is advocacy of the specified crime proscribed, even if likely to come to the children's attention, if extenuating circumstances exist, or if such advocacy is not likely to adversely affect the educational process or corrupt student morals. See 70 Okla. Stat. Sec. 6-103.15(C). Thus, the statutory scheme constitutes regulation, not a flat ban, on teacher advocacy of the specified crime.

²Based on its reading of Part III of the Tenth Circuit majority opinion, Appellee urges that the words "soliciting" and "imposing" were not stricken by that court. Based on its reading of the same admittedly ambiguous paragraph, however, the Board of Education will continue to maintain that the entirety of 70 Okla. Stat. Sec. 6-103.15(A)(2) was stricken, and that the words "soliciting" and "imposing", which perhaps even the Gay Task Force will admit possess a substantial legitimate sweep, should have been addressed by the Tenth Circuit majority in its "substantial overbreadth" calculus. See, e.g., Appellant's Brief at 10, 41.

³In its brief *amicus curiae*, the Attorney General of the State of Oklahoma defends the somewhat broader legal proposition that teacher expressions of controversial social or political viewpoints may be regulated when such advocacy "may promote strife within a school system." *Id.*, at 3, 4. While the Gay Task Force contends that this jurisdictional assertion is overly exuberant, it is not necessary to accept it to sustain the challenged statute, which on its face merely regulates teacher advocacy of a *specific criminal act*. In any case, the Oklahoma Supreme

The Board of Education will further maintain that the state's recognized power to ensure that its public school children are appropriately introduced to traditional, fundamental cultural values⁴ in the context of the public school educational experience empowers it to target certain "viewpoints" for regulation applicable to public school teachers *irrespective of whether the advocacy of such "viewpoints" constitutes advocacy of the commission of a criminal act*. Teacher advocacy of the "viewpoint" that students should take their studies frivolously, or that deceit, misogyny, or racial bigotry are acceptable behavioral attitudes, might well be regulated pursuant to this approach. It is not necessary, however, to conclude that "targeting" teacher "viewpoints" not directed to the commission of crimes is not per

³ (Continued)

Court, based on separation-of-power concepts, has limited the effect even of the more thoroughly reviewed Attorney General Advisory Opinions. See *State ex rel. York v. Turpin*, 681 P.2d 763, 766, 767 (1984); see generally Sparling, *Opinions of the Oklahoma Attorney General: An Analysis*, 6 Okla. City U. L.R. 373, 374-375 (1981). In any case, Appellant, not the Attorney General, is responsible for the enforcement of the statute. This Court has recognized the importance of limiting enforcement policies proffered by courts or enforcement agencies. *Kolender v. Lawson*, 103 S.Ct. 1855, 1857 (1983). The absence of prosecution since the statute's inception would belie any intent by Appellant to enforce it beyond its obvious effect of regulating teacher advocacy of the commission of the specified crime. See generally, *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) (related ripeness issues).

⁴See, e.g., *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 864 (1982); *Plyler v. Doe*, 457 U.S. 202, 221 (1982); *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954); *Acanfora v. Board of Education*, 359 F.Supp. 843, 847 (D. Md. 1973).

se unconstitutional⁵ to sustain the challenged statute, which is facially limited to teacher advocacy of a specified criminal act.

Nor does the statutory sweep encompass efforts to effectuate legal and social change. The Oklahoma Supreme Court has recognized the constitutional protection enjoyed by peaceable advocacy of the repeal of criminal statutes. *Gay Activists Alliance v. Board of Regents of the University of Oklahoma*, 638 P.2d 1116 (Okla. 1981). On the social front, much pro-homosexual advocacy is *not even regulated* by the challenged statute, including, for example, teacher advocacy of homosexual cohabitation, holding hands, and public kissing. Far from abridging any right to "core political speech" (advocacy of legislative change, for example), the statute regulates only the advocacy of a specified criminal act, and only when, on a case-by-case basis, an adverse effect on the educational environment or student morality has been found.

The Gay Task Force has attacked the statute's *nexus* factors as vesting virtually uncontrolled discretion in administrative hearing officers, creating a *de facto*, *post-hoc* licensing scheme, which maps out no hard core of easily identifiable unregulated conduct. This contention both fails to appreciate the quantity of conduct, described above, which plainly falls outside the statutory sweep, and hypothetically misconstrues the limiting force of the *nexus* factors.⁶

⁵Even the Gay Task Force seems to agree that such targeting might be validly pursued provided that legitimate governmental goals cannot be more narrowly achieved. Appellant's Brief at 23.

⁶Appellee has sought support for its conclusion that the *nexus* factors are not curative of any perceived statutory flaw by reference to this

First, the five cases propounded by the Gay Task Force as bringing the instant statute within the constitutionally proscribed area of standardless *post hoc* licensing, see Appellee's Brief at 15, n.20, beg the question, since the fatal defect in those cases was the *inadequacy* of their criteria, not their *existence*. Second, notwithstanding Appellee's vigorous protestations, see Appellee's Brief at 26, these factors are not "facially irrelevant to job competence" in light of the broad purposes of public education, involving the exposition of both knowledge and values.⁷ Third, it must be noted that the *nexus* factors bear striking similarity to court-approved subordinate criteria for applying more ge-

⁶ (Continued)

Court's holding in *Secretary of State v. Joseph H. Munson Co.*, 104 S.Ct. 2839 (1984), that the "possibility of a waiver" of Maryland's 25% limit on charitable fundraising expenses did not save that limitation from overbreadth invalidation. See Appellee's Brief at 16. Appellee, however, has failed to appreciate that the "fundamental defect" found by the *Munson* plurality was a *universally* mistaken premise "that high solicitation costs are an accurate measure of fraud", 104 S.Ct. 2839, 2852 (1984), a situation that truly rendered the statute fundamentally flawed, impermissible "*in all its applications*". *Id.* (emphasis added). Since the fundamental premise of the challenged statute is that *some* public advocacy of criminal sodomy (depending on the *nexus* ramifications) may create either sufficient educational disruption or corruption of student morals to warrant employment intervention, the statutory underpinning here is distinguishable from that in *Munson*. This reasoning also rebuts Appellee's claim that the statute *conclusively* presumes that "teachers' speech sympathetic to homosexuals is somewhat *inherently* unprotected", Appellee's Brief at 19, since it is the purpose of the *nexus* factors to permit a case-by-case determination of when it is, and when it is not. For examples of probable applications, see note 8, *infra*.

⁷See Appellant's Brief at 23-26, note 4, *supra*, and note 9, *infra*.

neric "teacher fitness" statutes,⁸ which would likely assist administrators if and when specific factual circumstances should arise.

In sum, the challenged statute is narrowly drawn, regulating, not prohibiting, the manner in which public school teachers advocate the crime of homosexual sodomy, leaving the advocacy of both legislative change and other forms of homosexual behavior unregulated. The narrowing *nexus* factors are as precisely drawn as is possible, given the breadth of the permissible legislative purposes in question. In any case, it cannot be presumed as a matter of law that Oklahoma Boards of Education, in applying the statutory

⁸See, e.g., *Morrison v. State Board of Education*, 461 P.2d 375 (Cal. 1969), where the California Supreme Court included, among the factors which may be considered pursuant to its generic "fitness" statute, "the likelihood that the conduct may have adversely affected students or fellow teachers", "the proximity or remoteness in time of the conduct", and "extenuating or aggravating circumstances". *Id.* at 386. The similarity of these court-approved factors to the first three *nexus* factors of the challenged statute is indeed remarkable; the absence of the fourth in *Morrison* is accounted for by the more specific harm addressed by the Oklahoma Legislature in the challenged statute. Cf. *Coupeville School District No. 204 v. Vivian*, 677 P.2d 192, 196-197 (Wash. App. 1984); *San Dieguito Union High School Dist. v. Commission on Professional Competence*, 185 Cal. Rptr. 203, 205 (1982). For a prototypical example of how the statute is likely to operate in the real world, see *Board of Education of Long Beach v. Jack M.*, 566 P.2d 602 (Cal. 1977), which used similar *nexus* factors to reinstate a teacher-dismissed for committing a homosexual act, because that act did not come to the attention of students or teachers *in fact*, was an isolated act preceded by unusual stress, and was unlikely to be repeated.

The Board of Education does, however, dispute Appellee's suggestion, see Appellee's Brief at 28, n.41, that the only interests which the State may protect in its educational system are interests "wholly unrelated to homosexuality". Cf. text following note 9, *infra*.

nexus factors, which have been applied in similar incarnations by various state courts over the last twenty or so years and which have *never* been invoked in the seven years of the challenged statute's existence, will precipitously attempt overzealous applications thereof. If, in fact, a "chill" exists at all, it is necessarily the product of that kind of subjective, impressionistic, and irrational fear as to which this Court has habitually refused relief.

II. TEACHERS' INTERESTS IN ADVOCATING THE SPECIFIED CRIME ARE OUTWEIGHED BY STATE INTERESTS IN FOSTERING THE BROAD GOALS OF PUBLIC EDUCATION.

While expressing a preference for the "less restrictive alternative" standard of review, the Gay Task Force has simultaneously urged that the *Pickering* balancing approach, 391 U.S. 563, 568-574 (1968), be applied only in a viewpoint-neutral manner, Appellee's Brief at 22, potentially precluding the discipline of teachers who, away from the classroom, publicly advocate deceit, irresponsibility, misogyny, or racial bigotry, unless a substantial disruption of the classroom environment arose, *even if a detrimental effect on student morality or ethical values could be demonstrated*. Such an effect, of course, is contemplated by the statute's final *nexus* requirement. Appellee's suggested approach fails both to properly apply the *Pickering* standards, and to apprehend that the effectuation of the broad goals of public education⁹ — including social integration — is its founda-

⁹See, e.g., Appellant's Brief at 23-26; text accompanying note 4, *supra*. Schools cannot foster "fundamental values" or play their vital role in preserving our system of government without making viewpoint-based

tional reason for being. Clearly, teacher advocacy of criminal sodomy has been recognized to have the potential for educational disruption:

A class of sixth graders, entering adolescence and troubled by their own developing sexuality may be significantly disrupted by the presence of a homosexual teacher who has recently expressed his or her views on the subject in . . . local newspapers.

Note, *Free Speech Rights of Homosexual Teachers*, 80 Columbia L.R. 1513, 1523 (1980). Concerning the "role model imitation" issue raised by the final nexus factor, while the Board of Education is well aware of the heated academic debate regarding whether homosexuality is predominantly a function of hereditary or environmental factors, it would respectfully urge this Court to refrain from concluding as a matter of law that impressionable students will not be induced to commit homosexual sodomy by their teachers when no consensus has been reached on that issue by the medical and scientific community as a whole. This Court has not heretofore demanded "scientifically certain criteria

• (Continued)

statements, particularly regarding youth in their impressionable years. Since "certain studies plainly essential to good citizenship must be taught, and . . . nothing taught which is manifestly inimical to the public welfare", *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925), then certain viewpoints, such as obedience to law, must be encouraged. This educational purpose is so important that studies show that "second and third-grade teachers consider the obligation . . . to conform to school rules a more important lesson than reading and arithmetic." D. KIRP and M. YUDOF, *Educational Policy and the Law* 147 (1982). It is because of the unique responsibility of the State for its students as students that Appellee's attempted analogy to prison inmates' censorship, see Appellant's Brief at 28, is inapposite.

of legislation", *Ginsberg v. New York*, 390 U.S. 629, 643 (1968), in cases involving protection of the interests of impressionable minor children.

The family also has a vital interest in schools, cognizable under *Pickering*, as parental interests in the direction and control of a child's education are central to constitutionally protected familial privacy rights. See *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). When the State, acting in loco parentis, has custody of children for specified times, it is required to perform the responsibilities of that custody in a protective and constructive manner.

The minor child also has a privacy interest, recognized by this Court in *Ginsberg v. New York*, 390 U.S. 629 (1968) and *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978), even where the child-audience was in no way "captive". This Court, rather than permitting the *Ginsberg* rationale to fall into desuetude, has recently reaffirmed its basic thrust:

It is well settled that a State or municipality may adopt more stringent controls on communicative materials available to youths than on those available to adults. See *Ginsberg v. N.Y.*, 390 U.S. 629 (1968).

Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975).

In sum, this Court has recognized both the validity and significance of the community interest "in promoting respect for authority and traditional values, be they social, moral or political". *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (emphasis added). Parents and students have correlative interests pursuant to the *Meyer* and *Ginsberg* approaches

described above. Applying *Pickering*, these interests outweigh teacher interests in the advocacy of the specified crime. Even assuming *arguendo* the cognizability of the "less restrictive alternative" approach as a *Pickering* balancing factor, no such alternative is available to meet the *sui generis* threat created by teacher advocacy of this specific crime.

Respectfully submitted,

Larry Lewis
Counsel of Record
Suite 410
4001 N. Lincoln
Oklahoma City, Oklahoma 73105

James B. Croy
P. O. Box 10798
Midwest City, Oklahoma 73140

Dennis W. Arrow
Oklahoma City University
Law School
2501 N Blackwelder
Oklahoma City, Oklahoma 73106

Attorneys for Appellant

January, 1985